United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

14-3

326

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 21893

STEVE P. XYDAS

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENTS OF ISSUES PRESENTED FOR REVIEW

I

Denial of access to subpoenaed F.B.I. records which were pertinent to appellant's major defense was so prejudicial as to deny him a fair trial on the merits.

II

Denial of the right to enter into evidence the transcript or its contents, of a taped conversation between government agent, James Skeens, and appellant, overheard by Captain Thomas Wert of the Metropolitan Police Department was unfairly prejudicial against appellant.

III

The sentence was imposed upon the appellant while the Court was under the assumption that there had been evidence presented in Court during the trial of certain information that appellant was under suspicion which if true was learned only from the F.B.I. records appellant was denied use of. The Court considered, in sentencing, the fact that appellant's name was mentioned throughout another conspiracy case in which appellant was originally charged and which was subsequently dismissed.

IV

Justice demands a new trial for the appellant on the charge of interstate transportation of stolen goods for which he was convicted

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This is an appeal from a judgment of the United States District Court for the District of Columbia, entered on January 22, 1968, convicting the appellant under Title 18 USC, Section 2314 (Transportation of stolen goods in interstate commerce).

Appellant filed a notice of appeal on January 29, 1968, and his appeal was duly noted. The judgment of conviction being a final order of the United States District Court for the District of Columbia, this Court has jurisdiction under U.S. Code, Title 28, Section 1291.

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because his defense was based on the question of his personal integrity and sense of responsibility and desire to help the authorities. The question of his mental attitude was primarily what the jury had to consider in determining innocence or guilt, therefore having the evidence adduced against him of arranging for the housebreaking of a friend and customer even though he was acquitted of these charges could not help but be a factor that the jury no matter how they tried could not eliminate from their minds.

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STATEMENT OF THE CASE

Steve Xydas, appellant herein, is a married man of 26 years duration with three children, now aged ten, eleven and thirteen. (Tr. Vol. 4 p. 481).[1]

Xydas was charged in a three count indictment for housebreaking, grand larceny and interstate transportation of stolen goods. He was tried and found not guilty by a jury on the first two charges and guilty on the third. He was sentenced from one to three years on the third charge and is presently on personal bond pending appeal.

Since April 9, 1959 he owned and operated a small restaurant and cafe (Tr. Vol. 4 p. 484) in a lower middle class neighborhood at the corner of 8th and F Streets, N. E., a block away from No. 9 Precinct of the Metropolitan Police Department.[2] Over the years his establishment was much frequented by Police Officers (Tr. Vol. 2 p. 257) which was a source of pride to Xydas. Agents of the Federal Bureau of Investigation also frequented the restaurant over a period of years from 1959 on an irregular basis. Xydas would sit down with these agents and pass information to them in

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1. Xydas' formal record stipulated to and read to the jury was free from any convictions and had only two old misdemeanor arrests (1941 and 1948) which were nolle prossed.

2. As a result of this conviction his application for renewal of his alcohol beverage license which he had held for ten years was not renewed, nor was his hackers license.

connection with their work.[3] All this time Xydas in his own mind at least was acting as an unpaid agent. These discussions were on an informal basis. As Xydas testified (Tr. Vol. 5 p. 604-605),he had Agent Carl Giovanetti and James Skeens together in his restaurant at one point. To substantiate Xydas' feeling of being a secret agent, although he received no pay for information given, he was allowed to carry on petty gambling and numbers activities which could not have gone unnoticed by the agents.

Xydas met Robert Earl Barnes early in 1964 and he was on a speaking basis with him as he was with his regular customers.

One of Xydas' customers was a woman by the name of Patricia Haley who lived around the corner from his restaurant at 518 9th Street, N.E. across from No. 9 Precinct and who spent a great deal of time in the restaurant and became friendly with Xydas and the others who worked there. Xydas placed numbers bets for her from time to time and on two occasions she won, on March 20, 1964 and April 2, 1964 (Tr. Vol. 1 p. 137, 148).

In an evening when Xydas was at the Shenandoah Racetrack, May 13, 1964, Barnes and his confederates planned and burglarized Patricia Haley's apartment and stole $1,600.00. Barnes' statement in his letter to then United States Attorney David Acheson in July, 1965 implicated Xydas.

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3. See: 1. First proposed stipulation(Courts Ex. No. 1); 2. Second proposed stipulation (Courts Ex. No. 2) and 3. Stipulation read to the jury. Reprinted herein after the Argument pages.

There was no corroboration of Barnes testimony at Xydas' trial concerning the Patricia Haley matter and the jury found Xydas not guilty of both count one - housebreaking and count two - grand larceny.

The importance of presenting this information, notwithstanding Xydas' acquital is for the purpose of demonstrating the unfair prejudice to Xydas when the government did not have sufficient or good cause to prosecute him and this will be detailed in argument of point number four below.

This is born out by the fact that the government also had the benefit of the grand jury testimony of James T. Skeens who Barnes claimed was a participant in the planning of the Haley housebreaking, who exonerated Xydas in testimony before the grand jury on January 10, 1966, which will be argued in point number four.

In the early morning hours of August 23, 1964, while Xydas was asleep his telephone rang and his wife going from the bedroom to the kitchen where the telephone was, answered it and determining that the call was for her husband, woke him up (Tr. Vol. 4 p. 482).

According to the testimony of Xydas the call was from Skinner Skeens (Tr. Vol. 3 p. 513) who said that he and Barnes wanted to see him. (Tr. Vol. 5 p. 567). Xydas got dressed and met them outside of his house. He was asked if he could store

some furs in his basement. He refused but did arrange for them to be stored in his sister's garage not far away. As he testified (Tr. Vol. 5 p. 567):

> "I wasn't aware of what they had in mind, they said they wanted to see me. It was a shock to me when they told me the time of the morning and so due to the fact that I knew they were wanted by the F.B.I. the least I could do was go along with the program and so I did."

The government's contention through the testimony of Barnes, was that Xydas participated in the inception by means of a telephone call the morning of the burglary of the French Poodle in which Xydas agreed to store the furs that were to be stolen in his basement. The only evidence of this prearrangement was Barnes' testimony (Tr. Vol. 3 p. 296) which was contradicted by Barnes' own statement made to the Grand Jury (Tr. Vol. 3 p. 315-317A and p. 340). The importance of this will be discussed in argument of point number two.

During the trial (Tr. Vol. 4 p. 508-510) it was stipulated that the mileage from the French Poodle to Skinner Skeens house is 10.1 miles, that the mileage from the French Poodle to Mr. Xydas' house was 6.8 miles and that the mileage from Skinner Skeens house to Steve Xydas' house was 7.1 miles (See map marked Defendant's Ex. No. 5 admitted into evidence at the time the above stipulation was read to the jury). The facts are that the furs were

brought to Skeens' house and the telephone call then placed to Xydas (Tr. Vol. 3 p. 317E).

The uncontradicted evidence was that Xydas did, in fact, find out that the agent who he had been dealing with last, Carl Giovanetti, was in the Washington Hospital Center and that he did go to see him sometime before September 14, 1964. (Tr. Vol 4 p. 524-526). Said agent Giovanetti was too ill to listen to him but named two other agents for Xydas to contact which he did on September 15, 1964, at which time he told them about the incident and the fact that he had two dresses and a fur cape which he later returned. (Tr. Vol. V, pp. 598-599)

Xydas was interviewed by the F.B.I. on September 15 and 16, 1964, and copies of these interviews were provided to Xydas. The crux of Xydas' defense was that he was not in any way involved in the planing of the burglary and that he used due diligence in reporting to the F.B.I. and that in fact he did report it to the F.B.I. before the F.B.I. had any knowledge of Barnes' or Skeens' involvement.

Xydas was originally charged along with 15 others in an eleven-count indictment as follows:

Count One - Conspiracy[4]

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4. Out of forty Overt Acts listed in the Conspiracy Count, four referred to Xydas.

1. On or about January 11, 1964, within the District of Columbia, the defendant Xydas met with Robert Earl Barnes and the defendant Lawrence F. Wallace.

2. On or about January 12, 1964, within the District of Columbia, the defendant Xydas met with Robert Earl Barnes and the defendant James T. Skeens.

7. On or about March 1, 1964, within the District of Columbia, the defendants Steve P. Xydas and Lawrence F. Wallace, met with Robert Earl Barnes.

8. On or about March 1, 1964, within the District of Columbia, the defendants Steve P. Xydas and James T. Skeens met in the presence of Robert Earl Barnes.

Count Two - Housebreaking (Patricia Haley)

Count Three - Grand Larceny (Patricia Haley)

Count Six - Interstate Transportation (French Poodle Furs)

In pre-trial proceedings involving most of the indicted persons the government stated that it would try Xydas on Counts Two, Three and Six and dismiss the Conspiracy Count One when judgment on those Counts was entered.[5]

When the trial began on September 20, 1967, the Honorable Judge John Lewis Smith, Jr., presiding, the re-drafted indictment was as follows:

Count One - Housebreaking (Patricia Haley)

Count Two - Grand Larceny (Patricia Haley)

Count Three - Interstate Transportation (French Poodle Furs)

Prior to the commencement of the trial the government submitted to the Court, F.B.I. records subpoenaed by Xydas covering his activities since 1959 dealing with his association with F.B.I. agents. These records are under seal and are a part of the record in this appeal. Though counsel for Xydas protested at length for the right to examine these documents for proper presentation of the defense he was not allowed to do so and the government's Motion to Quash was granted. (Pre-Trial Proceedings, Sept. 19, 1967, p. 224).

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5. The Conspiracy Count was ultimately dismissed.

The Government offered the first proposed stipulation (Court's Exhibit No. 1) (pages 53-56 herein) which was patently unacceptable and brought forth the second proposed stipulation (Court's Exhibit No. 2) (pages 56-58 herein) which was less nefarious but nevertheless against the interests of Xydas. As a final measure, after the Motion to Quash was granted, counsel was obliged to accept the stipulation that was entered into evidence (pages 58-60 herein) rather than have nothing at all.

The prosecuting attorney, in his opening statement, went into detail about gambling and numbers operations (Tr. Vol. 1, pp. 92-94). He also referred to Bobby Hamilton as a participant in the French Poodle Burglary (Tr. Vol. 1, p. 98-99).[6]

The Government's first witness was Inspector William D. Foran (Tr. Vol. 1, pp. 136-137) who testified how the numbers operation in the District of Columbia worked.

Patricia Haley was then called and testified as to the housebreaking and the fact that she had played the numbers with Xydas (Tr. Vol. 1, p. 147).

The Government then called Harold Baker whose testimony

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6. A jury acquitted Hamilton of this charge on December 16, 1967.

was not harmful to Xydas notwithstanding the prosecutor's opening statement.[7] Baker has never been indicted on any charges, including the French Poodle burglary and three others he admitted committing with Barnes.

At the outset of the second day of trial on September 21, 1967, the prosecuting attorney advised the court that the chief prosecution witness, Robert Earl Barnes, intended to invoke his privilege against self-incrimination (Tr. Vol. II, pp. 205-220). Barnes was then called as a witness and he did refuse to testify on the ground of self-incrimination (Tr. Vol II, p. 221). The government referred then to a letter or statement granting immunity to Barnes if he testified and requested a continuance for the purpose of having it signed and presented to the Court (Tr. Vol II, pp. 229-231, 265, 274-275, 277 and Tr. Vol. III, p. 283). After all the discussion referred to in these pages the letter was never signed. Barnes then took the stand and did testify.

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7. Tr. Vol. I, pp 96, 97,

Mr. Sullivan:

> "You will hear, for example, from witnesses such as Harold Baker, who was likewise a burglar, although he recently has been driving a truck and selling and working at some legitimate work in the Washington area for the last couple of years, you will hear from him that he was a burglar at the time and that shortly after the Pat Haley housebreaking the defendant Xydas acknowledged his part in it and spoke about the silver dollars which he was adding to his coin collection."

Excerpts of Marsha Skeens and James T. Skeens Grand Jury testimony were turned over to Xydas, some bearing the letter "c", meaning cautionary, that is, that certain names mentioned should not be revealed. (Tr. Vol. IV, pp. 385-386, 404).

The prosecuting attorney and the court determined that the statement of Martha Painter was not an exculpatory statement and, therefore, not to be provided as such to Xydas under the Brady and Levine[8] doctrine, in opposition to Xydas' claim that it should have been presented voluntarily by the government at or prior to the trial and not as it was, as a Jencks Act statement. (Tr. Vol. IV, pp. 401-403).

In order to prove his good faith intentions to help the F.B.I. convict Barnes and Skeens, Xydas called as defense witnesses several F.B.I. agents to testify about his dealings with them since 1959.

Of course this was done of necessity without the benefit of the contents of the interviews Xydas had with the F.B.I. over the past number of years which were contained in the records involved in the Motion to Quash the subpoena.

Robert M. Franklin, Special Agent, testified that he was in touch with Xydas on several occasions in 1959. (Tr. Vol. IV, p. 435).

He also testified that he introduced Xydas to another agent when he was no longer able to see him and that he didn't write

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8. Brady v. Maryland 373 U.S. 83 (1963), and Levine v. Katzenbach 363 Fed. 2d. 287, 124 U.S. App. D.C. 158.

down every single date that he saw Xydas (Tr. Vol. IV, pp. 435-436, 438).

Agent Carl Giovanetti was than called to the stand and he testified that he was introduced to Xydas by Agent Bob Franklin when Agent Franklin moved to another job and that there was no question of dropping Xydas or anything like that but that Bob Franklin was transferring Xydas over to him (Tr. Vol IV, p. 442).

Agent Giovanetti testified that he made a note of the date of each and every time he talked to Mr. Xydas and that those dates were the dates reflected in the stipulation (Tr. Vol. IV, p. 443). He then testified that he went to the Washington Hospital Center around the 9th of September 1964 (Tr. Vol IV, p. 443), and that when Xydas came in about the 14th of September he told Xydas that he had just had an operation and didn't want to hear anything and that he then told Xydas to contact agent Edward Wills in the Washington Field Office (Tr. Vol. IV, p. 445).

On cross examination by the government Agent Giovanetti was unable to recall whether there had been contact between the F.B.I. and Xydas between the dates of November 13, 1959 and September 23, 1960 (Tr. Vol. IV, pp. 446-447). He was also unable to recall the date of his last contact with Xydas and also in answer to a question by the prosecuting attorney he was unable to recall whether or not he recommended to the F.B.I. that the F.B.I. informant file on Xydas be closed.

On re-direct examination Mr. Giovanetti was unable to recall whether the alleged meeting on May 14, 1964 was in Xydas' restaurant or not. (Tr. Vol. IV, p. 449).

Agent Richard Marquise testified that Xydas was interviewed by him and agent Edward Wills on September 15, 1964 at which time Mr. Xydas indicated that he was referred to them by special agent Giovanetti and that he also saw Xydas on September 16, 1964. (Tr. Vol. IV, p. 455).

Agent Edward Wills then testified that he interviewed Xydas on September 15 and 16, 1964 and that he was told by Xydas that special agent Carlton Giovanetti referred him (Tr. Vol. IV, p. 460).

Xydas' wife took the stand./ (Tr. Vol. IV, pp. 479-483). Then Xydas testified that he had contacts and meetings with the agents at various places, such as the United States Court House, on the street, restaurants, his place of business, near his home and near Union Station (Tr. Vol. IV, p. 492). That he didn't want Barnes and Skinner to get away (Tr. Vol. IV, pp. 517-518, 522) and that he took dresses and a fur cape for evidence.

In cross-examining Xydas the prosecuting attorney referred to May 14, 1964 as the terminal date of contact with the F.B.I. from 1959 and again, on page 560/ of Vol. V, emphasized the date of May 14, 1964 and on the same page asked Xydas "as a matter of fact, even after that, you never told any F.B.I. agent any information about the Haley housebreaking, isn't that right?" This questioning regarding

dates and what Xydas told to the F.B.I. carries through to page 561, all the time the prosecuting attorney having the benefit of the F.B.I. records which were denied to Xydas.

And on page 586, the prosecuting attorney asked Mr. Xydas if he was also contacted during the same three years by Agent Bernie Busher and Agent John Flaten. These were names not mentioned in any of the stipulations nor known to Xydas' counsel even by name, much less as having anything to do with Xydas (Tr. Vol. V, p. 586).

The thrust of the Government's case was that it took some time (21-23 days) for Xydas to contact Giovanetti who was in the hospital part of this time, but the Government also had this problem (see Tr. Vol. V, pp. 626, 641-645, 651-652). The fact is, however, that Xydas did inform the F.B.I. who committed the French Poodle burglary and provided them with evidence. The question of Xydas' intent became the major issue.

During the Government's closing Argument, great emphasis was placed on Xydas' numbers writing activities. The jury returned a verdict of guilty of the charge of interstate transportation of stolen goods and the appeal was noted on January 19, 1968.

STATUTE INVOLVED

Title 18 USC, Section 2314

Transportation of stolen goods, securities, moneys, fradulent State Tax stamps, or articles used in counterfeiting.

Whoever transports in interstate —— commerce any goods, wares, merchandise, —— of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more;...

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

I

DENIAL OF ACCESS TO SUBPOENAED F.B.I. RECORDS WHICH WERE PERTINENT TO APPELLANT'S MAJOR DEFENSE WAS SO PREJUDICIAL AS TO DENY HIM A FAIR TRIAL ON THE MERITS

Appellant Steve Xydas issued a subpoena to the F.B.I. for records showing his contacts with them. These records were duly presented in Court but instead of being turned over to counsel for Xydas they were presented to the prosecuting attorney who promptly moved to Quash the Subpoena. During the discussion in Court on this motion which carried over several days, the government presented to counsel a proposed stipulation which, if accepted by Xydas would have been enough to convict him by itself. (See first proposed stipulation, page 53 of this Brief). When this was refused by Xydas, the government presented the second proposed stipulation which again was very damaging to Xydas.

The government, during these proceedings on it's Motions, acting as prosecutor, attorney for the F.B.I. and at the same time as a quasi-defense attorney to the extent of going through the F.B.I. records that the defendant subpoenaed, picked out what he thought the defense should have.

At the point where the first and second proposed stipulations were refused, the Court granted the government's Motion to quash the subpoena and then it was up to Xydas to get whatever information he

was able to get the government to gratuitously present which resulted in an agreed stipulation giving certain dates without any background or details. (Pre-trial Pro. p.224).[1]

The following are some simple illustrations applied to this case of the principal enunciated in Dennis v. U.S., 384 U.S. 855,[2] that a defendant and his counsel should have the opportunity to determine need for documents and not the judge who is not privy to counseling between client and attorney.

On Tr. Vol. IV, page 440, the prosecuting attorney stated to the court something about Xydas talking to an agent about Haley. This reference if in the F.B.I. records may have been of some importance to us to show Xydas was telling the truth.

On page 448, Vol. IV, the prosecuting attorney refers to May 14, 1964 meeting with Agent Giovanetti and Xydas not mentioning Haley to him. In order to refresh his recollection as to whether or not this was actually the last meeting Xydas would have to see the records concerning that crucial May 14, 1964 meeting.

On page450-453, Vol. IV, objection by Xydas was made to governments obvious use of the F.B.I. records that were denied to him.

On page 604-605, Vol. IV, Xydas testified that he had Giovanetti and Skeens in the restaurant together. It could be of

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1. See page 58 of the Brief for the agreed stipulation.
2. See Allen v. U.S., 390 F2d 476 (1968) and cases cited therein.

great importance to show whether or not Giovanetti recorded this fact in his notes. If he did it may have been helpful for Xydas to refresh his recollections as to his dealings with Giovanetti from May 14, 1964, until August 22, 1964. And if it was not reflected in his notes it may have been helpful to Xydas to show that the last date of contact stated as May 14, 1964, was merely the last date that a contact was recorded.

As it turned out, the gratuitous stipulation which was all that the defendant could get from the government was used by the government to damn Xydas. As in Tr. Vol. VI, page 803, in the final stage of the closing argument where the prosecuting attorney refers to the stipulation at great length. And on page 814, he says that Xydas' cooperation with the F.B.I. was empty, that it was not cooperation but just getting something off his mind.

On page 585, Tr. Vol. V, the prosecuting attorney refers to Agent James Garten contacting Xydas 1961-1964. But there is nothing in the stipulation about that. He also refers at page 590 to Xydas telephoning Giovanetti at 3 a.m., October 5, 1961, and that date isn't in the stipulation. On page 642, the government calls Giovanetti's testimony crucial to the government's case. It would have been crucial to the defense case(he was subpoenaed by the defendant not by the government) if the subpoenaed records were available to the defense. (See page 709c, 709e and 802-804, Vol. VI).

Justice Fortas in the Giles case[3] apropos to this issue said:

> "In an adversary system for determining innocence or guilt 'it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts. Exceptions to this are justifiable only by the clearest and most compelling considerations. '"

From September 12 to September 19, 1967, during pre-trial proceedings there was a good deal of discussion of the need for and producibility of these F.B.I. records of Xydas' contacts with the F.B.I. Xydas' position on these points that were discussed is best presented by reciting the discussions in chronological order.

On September 12, in Vol. I, page 10 of the Pre-trial Proceedings, the government stated:

> "Last evening a group of subpoenaes were served by the defendant on J. Edgar Hoover and various representatives of the F.B.I. These subpoenaes, which are 7 in number, called for any records of The F.B.I. of any dealings with the defendant Xydas at any time. And not just, as I understand it from the face of the subpoena, -- not just related to this particular case. I have been advised that from time to time, from a date in 1959 forward, that there were various meetings between agents of the F.B.I. and the defendant Xydas."

On page 11, counsel stated:

> "These are subpoenaes issued for these documents. I think I have a right to look at them and see if there is anything in the documents

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3. Giles v. Maryland, 386 U.S. 66 (1967).

that could be helpful to the defense. That's the reason I subpoenaed them."

On page 12, counsel further stated:

"Your Honor, the purpose of subpoenaing these records is to show, if I can, which I do believe I can, that Mr. Xydas was cooperating with the F.B.I. and helping them since 1959. And this may become important if there should be a denial, for example, that this was done. And, therefore, I would like to see the reports, and see if the reports do not reflect that he cooperated with the F.B.I. since 1959."

On September 15, 1967, in Vol. II, page 87, of Pre-trial Proceedings, Counsel stated:

"Again Mr. Sullivan, I suppose, is taking upon himself to represent the F.B.I. in this matter, to quash subpoenaes. That's what it sounds like to me.

I'm running the defense, and I'm not looking for those records for the purpose that he said. Part of our defense is that Mr. Xydas was working and helping the F.B.I. since 1959. I want to see those records. I want to see when Xydas spoke to the F.B.I. I don't care about the contents of all of them necessarily. I amy be concerned with them, I may not. The purpose of the subpoenaes is to get information which I may or may not present during the course of the trial. I have a right to see them. I want to see them and I would take out whatever is helpful to the defendant."

On page 138 of the Pre-trial Proceedings of September 15, 1967, counsel explained why he needed the records of the F.B.I.:

> "Now Xydas, as you heard from the tapes, is not a very articulate person, and it's very difficult to get from him dates and so forth. He tells me certain things that happened, certain dealings he had with the F.B.I. But this is what he needs a lawyer for. He wouldn't need a lawyer if he was just going up and talking at random. He needs someone to pinpoint things for him. I have to know when certain things happened. The only way I can know is to see the records. They'll have the dates. They'll have the persons who talked. He says, 'Why, I told this F.B.I. man this on such and such a time, this area of time.' But he doesn't remember the name of the agent, so it's important for me to know that, this is part of the defense. It's like any other subpoena. You get all kinds of extraenous information under subpoenaes. Then it's a question of whether it's admissible in evidence and what isn't. And all I want to do is to go through it and see what part of it I can use and what part I can't. I've subpoenaed several F.B.I. agents, and I want to know which ones I want to testify."

On the day before the trial began, that is September 19, 1967, a pre-trial hearing was held which covered among other matters, the question of the production of the F.B.I. records. Mr. Sullivan, on page 202 of the Transcript of that day, stated that the records sub-

poenaed were present in court and that it was the government's position that the file should not be turned over to the defense. He said that it was the government's position that the files themselves were of a confidential nature and has been no showing of materiality or relevancy on behalf of the defense which would require the production of these files, although he did turn over the F.B.I. records concerning statements made to the F.B.I. by Xydas on September 15 and 16, 1965. The government claimed that the nature of the files was such that it is confidential and production of the files would cause a great detriment to effective operation of the Federal Bureau of Investigation, claiming that it would divulge the internal workings of the F.B.I. which would be of intelligence value to anyone outside of the F.B.I.

The government had previously submitted the first proposed stipulation which was refused by counsel and it then produced the second proposed stipulation stating that the government would ask that it as well as the first proposed stipulation be made part of the sealed record, should the stipulation not be accepted by Xydas as he understood that Xydas would not accept them, so they would be preserved by the court for the purpose of appellate review should a conviction be obtained in this case.

In the September 19, 1967, proceedings counsel explained his position, on page 207, by stating:

> "The defense in this case is that Mr. Xydas believed in his own mind that he was an agent without pay for the F.B.I. Now this is our defense. He did, in fact, certain acts because he thought he

was helping the F. B. I. And the proof will show that he did in fact turn over the information as to what he did to the F.B.I. then this background of his dealings with the F.B.I. is exculpatory. And this is our whole defense. And so obviously, your Honor, not going into it as defense counsel would not see each item as exculpatory when taken as a whole and the history of the contacts could very well be, and is in fact, our defense and is exculpatory if the jury believes it.

Counsel continued on page 212,

"Now with regard to this stipulation, this is probably as an unfair procedure as I could ever imagine and I shall show how unfair it is.

The Government, pursuant to a subpoena that I served, gets the document, peruses the document, and he says, "I, as an officer of the Court, had no right to them." Well, Mr. Sullivan is no more an officer of Court than I am, and he has a right to it, and he is -- there is no indication that his seeing them is a detriment to the operation of the F.B.I., and I feel it is a slur on the defense counsel of this city that they should be considered to be a detriment to have them have that information that Mr. Sullivan has access to, and he feels it is not a detriment to the operations of the F.B.I."

On page 214, Counsel explained why these stipulations could not take the place of seeing the records themselves,

"This would be as condemning as helpful or could be, because the jury could believe that these contacts were contacts to defend himself or something.

That is what I point -- want to point out in the stipulation. For example, the last paragraph of the stipulation, and this is the summary which the government wants me to present, with my name on it as stipulated to to the jury. It States here, 'no record exists that the defendant Xydas ever reported to the F.B.I. any information concerning the Pat Haley housebreaking and grand larceny, charged in counts one and two, prior to his being charged with complicity in the offense.'

Now, first of all, it is common knowledge as -- when we have the trial, I will present in the record -- it is in the record of the Wallace trial that everyone talked about -- from the same night of the Haley house-breaking forward, about the Haley house-breaking, Xydas wasn't involved in it. He didn't have any personal knowledge of it. There were rumors and right from the first night on, everybody was talking about it, and everyone who went into Xydas' restaurant, which was practically all of the Ninth Precinct Police Department. And so to put it in such a statement as that is so mis-leading to think that Xydas had particular information that the F.B.I. didn't have, and he didn't turn that over and if that isn't a condemning statement on the surface of it, I don't know what is. This is what I get back from subpoeneas that I issue to try to help the defense. Now this isn't all. There's another thing here concerning the repurchase of a gun. Why would he want that stipulation to be in, about Xydas' involvement with a gun or the offense against the laws of Maryland. What has that to do with my purpose of trying to show that Xydas was in fact informing. Now, maybe I can't do that. Xydas tells me and this is my need -- that over the years since 1959 he was in contact with the F.B.I. and from time to time he would give them certain information. Now the fact that he did see them, corroborates him to help me to show my need and now it is vitally important for me to know just what the circumstances were, who initiated it, who the persons involved were, and if they are concerned with this case. Now, for example, I think they probably were very well involved with Skinner Skeens. Now, if this is the case, Skinner Skeens is one of the persons who was charged -- excuse me, not charged but accused by Barnes as participating in the Haley matter and in the Poodle matter and so what more of a need would I have than to see what was said about it. Now again, the question of relevancy is something that no one but myself, knowing what I can dtermine and I don't have to bear my whole case at this time. I think I have done that pretty much in telling what my entire defense or a great portion will be.

The following then took place:

The Court:
With due deference to Justice Fortas in the Dennis case, in the Supreme Court, I can say that having reviewed these records in camera that I believe this Court is in a position to determine that they are not relevant to the present charges. Many of these contacts go back long before the charges in the present case were ever in existence and dating back to 1959.

Mr. Lowe:
Your Honor, I have no intention of presenting to the Court, during the trial, anything that isn't relevant, but I submit that I have a right to see what these contacts were so that I may want to pick out one or two and put one of the agents on to discuss one of those.

The Court: For What purpose?

Mr. Lowe:
To show, for example, continuity of contacts initiated by Xydas, where Xydas did in fact give valuable information. Now I have no way of knowing which agents to put up on the stand. I may have to put half a down on the stand. First of all, they don't talk to me about the case until they get on the witness stand, which is fine. This is another reason why I want to see what the files show.

The Court: You have the --

Mr. Lowe:
I can't put a witness on the stand without knowing what he will say, or even what he is going to base it on.

The Court:
The government is stipulating as to the contact and the dates of contacts which would show the continuity.

Mr. Lowe:
Yes, your Honor, but it doesn't show me it was for the purpose of giving aid to the F.B.I. For example, I don't know whether they would get up and testify that these contacts were for purposes of trying to trap him. If he does that, well our whole case is out. There is an obligation on the part of defense counsel before he puts a witness on the stand to know at least -- at least have a very good idea what he is going to testify to, and they won't discuss it with me until they go on the stand. I have to be able to see what there is to be seen. As I say, if its not relevant, then I don't get them, I mean I won't use them, and that is what I don't understand what is there about these records that are of a confidential nature, not any different from any police department or Metropolitan Police Department records or records of a confidential nature that are subpoenaed every day in the week. And I don't know that and Mr. Sullivan has not pointed it out. And he has not pointed out any authority for preventing under lawful use of these confidential records. The fact that it isn't commonly done is not a reason. And I think that under these conditions I have shown a very vital need, and a need that I cannot put on a defense properly here because I don't know -- it's too dangerous to put on an F.B.I. agent that I have six of them under subpoena when I don't know what they may or may not testify to. And yet, without them I have no defense.

Counsel continued on page 222:

The more Mr. Sullivan argues against the production it would appear to me the more reason that I should have them. They must be vitally important to me. Now if Xydas had a good memory or if he made notes I could have access to everything in there anyway. The fact

that he doesn't is the reason whey these papers are needed and it wouldn't be any earth shaking event to the F.B.I. if Xydas had made notes himself of what happened after he had these contacts, this is the whole point, were those contacts exculpatory or where they not. If they were contacts that made Xydas -- as a reasonable man, the jury believed these contacts were of such a nature that made Xydas believe that he was helping the F.B.I., then they might accept his explanation why he did what he did in connection with these charges. So it is the core of our case, and now the reason that I am arguing so much is that I don't want this point to go up to the Court of Appeals. If possible, I would like to make a suggestion that might resolve it. Instead of the government drawing up a stipulation, I would like to have the opportunity, with Your Honor, and I do not see why I could not do this with you, just like Mr. Sullivan has been doing with the Grand Jury minutes and with all the other statements, to go over with Your Honor, without me even seeing the F.B.I. records, and for Your Honor to take them and give me a summary which would prevent me from learning which -- I don't think it is important but the government does, and Your Honor does, and it would prevent me from learning ways in which certain methods of the F.B.I. are carried on. That is what he is trying to prevent. So that Your Honor could tell me the purport of these statements and then I could determine whether or not they would be helpful and discuss them from that point of view. But just for me to be in the dark as to what these contacts are on 30 or 40 occasions or more; and by then doing this I possibly could make a proposed stipulation which would satisfy all the rpotections that we are concerned about. Now again, I don't

> know in a protection -- I don't see any great need of proection in this case and to at least out balance the vital need of defense, we could do that.

Nevertheless, on page 224, the Court granted the government's Motion to Quash the Subpoenaes as for the production of the documents in question. And then stated,

> "But I will be glad to meet in Chambers with you and Mr. Sullivan to discuss the wording of the stipulation." [4]

The right of an accused to secure the public records containing the material embracing the accusations has been further extended by the Federal Public Records Law. Title 5 U.S.C. Section 552, effective July 4, 1967. The act is frequently referred to as the "Freedom of Information Act" and is the result of a twelve-year effort on the part of the bar, the press, and Congress to eradicate many decades of unwarranted secrecy in the Executive Branch of the Federal Government. The new law obviously would require that the appellant's counsel in this case be given the F.B.I. records so as to prepare his defense for a fair trial and thus receive due process of law as contemplated by the Fifth Amendment.

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4. Thus there is no question that the stipulation signed by counsel as being an agreed stipulation was not a substitute for the subpoenaed records but merely a gratuity on behalf of the government.

II

DENIAL OF THE RIGHT TO ENTER INTO EVIDENCE THE TRANSCRIPT OR ITS CONTENTS, OF A TAPED CONVERSATION BETWEEN GOVERNMENT AGENT, JAMES SKEENS, AND APPELLANT, OVERHEARD BY CAPTAIN THOMAS WERT OF THE METROPOLITAN POLICE DEPARTMENT WAS UNFAIRLY PREJUDICIAL AGAINST APPELLANT.

During the course of the trial, counsel for Xydas arranged with the prosecuting attorney and Capt. Thomas Wert, the custodian of the tape of a telephone conversation between James Thomas Skeens and Xydas on February 5, 1966, to have Judith Derenberger of the Derenberger Reporting Co. to transcribe this conversation.

On September 25, 1967, the transcript was presented to the Court and counsel stated that it was his intention to question Capt. Wert or Capt. Woodard, both of whom were available, as to questions about what they overheard when monitoring this conversation.

The government objected to this, stating that there was nothing admissible about the contents of the conversation, and that it was merely a self-serving declaration. (Tr. Vol. IV, p. 467).

The contents of conversations which were obtained in similar manner, that is, by the government's using an informer agent, to question prospective defendants was admitted in the trials in the case of U.S. v. Wallace, et al. Crim. 486-66, and subsequently, in the

trial of U.S. v. Klein, et al. in Crim. 595-66, supposedly as admissions against interest.

Counsel has repeatedly stated his position that the method of obtaining this evidence was illegal and thus not usable in evidence. However, in fairness to Xydas, if tainted evidence is to be used at all it should not be denied him where it may very well help to exonerate him.

The importance of this taped conversation is that it shows with regard to the Haley housebreaking that Xydas was not involved by the simple fact that since, according to all of the government's evidence, Skeens was a participant, Xydas could not say directly to him if he himself was involved as he did during this taped conversation,

> "You knew I didn't have anything to do with the Haley case."

and Skeens answered back to him,

> "Well, I don't know anything about it and I don't know whether you did or not."

As counsel pointed out at that point (Tr. Vol. IV, page 469),

> "Now obviously, if Skeens and Xydas were sitting in a booth with Barnes, planning and seeting up this housebreaking, they wouldn't later on between the two of them start accusing each other and denying their participation to each other."

The court, on page 470, stated,

> "In the first tape there was nothing, in the Court's opinion, that would be of an exculpatory nature.

(This entire discussion involves the first tape as there was a second tape but it was unintelligible.)

A few lines further on, however, the court states:

> "To some extent there is a denial of participation but he can take the stand and deny that without getting into a tape."

The court, on page 471, states:

> "It is not admissible anyway, but for the record I want to add that statement---
> Having heard the tape I know of nothing that would be of particular benefit to the defendant."

Counsel countered by saying,

> "If two people are supposed to be part and parcel of a crime, and have planned it together sitting side by side, and if those two people at a later time, out of the presence of any third parties, deny to each other their participation, it seems to me that this is exculpatory."

On page 4 of transcript of this February 5, 1966, conversation, referring to the Pat Haley housebreaking, Xydas stated,

> "I don't know nothing about it either, that is what the Government got me charged with. You know I had nothing to do with it don't you?"

With regard to the French Poodle burglary, reading this transcript of the February 5, 1966, conversation, pages 19 through the end, clearly show that Xydas was the informer and the only

informer.

Since the F.B.I. were the ones who Xydas informed to it is obvious that they passed the information on to the U.S. Attorney's office who then passed on the fact of Xydas informing to Skeens for the purpose of attempting to entrap Xydas in this telephone conversation.

EXCULPATORY STATEMENTS

Regarding the question of what is an exculpatory statement requiring production by the government prior to or at the outset of the trial under the Brady and Levine doctrine, there was much discussion prior to and during the trial.[1]

Xydas refers the court to the statement of Martha Painter which the government felt was not exculpatory and which counsel argued vigorously was. See Transcript Vol. IV, page 405, where it was identified as an 18 page document, government's exhibit 2 for identification.

In Transcript Vol. IV, pages 373-374, the prosecuting attorney says that this statement in his judgment is not exculpatory.

What could be more exculpatory than the statement read into the record from her written statement to the government as follows:

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1. See Tr. Vol. I, pages 179-182, 201; Tr. Vol. II, pages 266, 268-269, 280, 308-320, 324-326, 322, 331 and 340.

Question to Martha Painter:
How long after she hit the number did the place get broken into?

Answer:
It was not much longer. I don't think because the night that it happened I remember Mr. Xydas went to Shenandoah and when he * came back he didn't come in the restaurant. He stopped the car outside and I told him Pat's apartment was broken into. I said she is so upset she is crying. As soon as we close we will go over there.

Following on page 402, the prosecuting attorney again stated that in his opinion this was not exculpatory.

Counsel again states as he did then, "How can we tell how many half-dozens of statements like this there are in the government files that should be and have not been made available to the defense.

The fact that Martha Painter had stated that to her knowledge Xydas was in Shenandoah the night of the Haley housebreaking would never have come out if she had not been called by the defense as a witness and the underlying purpose of the Levine and Brady doctrine is to provide the defense with whatever exculpatory information the government has before or at the outset of the trial so that they can call in witnesses that they might not have known about.

If it is found that the government has an erroneous view of what

*Underlining added by appellant.

is presentable and what isn't a new trial certainly should be granted with the government having an opportunity to go through its records again to determine in view of the correct interpretation what should be turned over, and see if there is anything further that the defense is entitled to on the French Poodle charge of which Xydas was convicted. See Tr. Vol. IV, pages373-374 and 401-403.[2]

On September 12, 1967, at a preliminary hearing Xydas requested to see the entire Barnes Grand Jury testimony, Vol. I, pages 29-30 of that hearing. This request was denied. However, when excerpts was given to the defendant it was found, on pages 135-136 of his grand jury testimony there was a complete exoneration of Xydas as to the planning of the French Poodle burglary in contradiction to Barnes' testimony at the trial.

Pages 136 reads as follows:

> Barnes:
> So what we figured on doing was stashing the furs until we could get somebody to buy them but we forgot to find a place to stash them so we called Steve Xydas * and told him that we had a truck load full of furs....[3]

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2. Also see Transcript Vol. IV, page 382 where the court stated that there had been fairness and full disclosure by both sides.

3. For the full two-page quote that this sentence was taken from, see Transcript Vol. III, page 340.

*Underlining added by appellant.

On page 49 of Volume I of the Pre-trial Hearing on September 12, 1967, Xydas' request for Skeens' Grand Jury testimony was denied.

On pages 96 and 97 of the September 15, 1967, Pre-trial Hearing, counsel advised the government and the court that there were exculpatory statements by James Skeens in his grand jury testimony. After arguing on the subject through page 116, the exculpatory statement of James Skeens was finally produced by the governmentand read into the record on pages 119 to the top of page 121. (See page 47 of this Brief for quote of this exculpatory statement, - also see further discussion through page 129 of the September 15, 1967 hearing.)

As stated above a crucial question in the French Poodle case was whether or not Xydas knew in advance that the burglary was to take place. Subsequent to the trial, counsel, being involved in another case, received page 1809 of Marsha Skeens Grand Jury testimony which was exculpatory of Xydas on that very crucial point, and the failure of the government to provide this is enough to warrant a reversal and a new trial on the French Poodle case. The statement is as follows:

> Marsha Skeens:
> When the furs were stolen, they had taken them to my house to begin with, and my neighbors were having a --- you know, they watch me anyway. So they decided not to leave them there and they took them to Steve Xydas' sister.....

III

THE SENTENCE WAS IMPOSED UPON THE APPELLANT WHILE THE COURT WAS UNDER THE ASSUMPTION THAT THERE HAD BEEN EVIDENCE PRESENTED IN COURT DURING THE TRIAL OF CERTAIN INFORMATION THAT APPELLANT WAS UNDER SUSPICION WHICH IF TRUE WAS LEARNED ONLY FROM THE F.B.I. RECORDS APPELLANT WAS DENIED USE OF. THE COURT CONSIDERED, IN SENTENCING, THE FACT THAT APPELLANT'S NAME WAS MENTIONED THROUGHOUT ANOTHER CONSPIRACY CASE IN WHICH APPELLANT WAS ORIGINALLY CHARGED AND WHICH WAS SUBSEQUENTLY DISMISSED.

When Xydas was sentenced on January 19, 1968, to be incarcerated for not less than one year nor more than three years, the court stated that he had given careful consideration to Xydas' good record, the testimony of his wife at the trial and his general respect in the community as well as his service record, but nevertheless refused to grant probation.

In a colloquy between the court and counsel, it appeared that the court believed that there was evidence adduced at the trial to show that Xydas was a suspect in the case before he went to the F.B.I. and told them what he had done.

This is apparent from the dialogue on page 5 and 6 of the sentencing transcript, which reads as follows:

Mr. Lowe:
Could I say one last thing?

The Court: Yes.

Mr. Lowe:
The evidence did show, however, the Mr. Xydas went to the FBI and did tell them, even though it was a matter of weeks that --

The Court:
<u>After he was then a suspect in the case.</u> *

Mr. Lowe:
Excuse me, Your Honor. This is where I think the facts -- that is not the fact.

It is a fact that Xydas did not reach the F.B.I. before the 3 week period. However, it is also true that he was not under suspicion at the time he did contact the F.B.I. and there was nothing in the record to show that he was under suspicion.

For this reason, it is respectfully requested that the court's sentence which was partially based on this misconception would require resentencing.

The F.B.I. report of the September 15 and 16, 1964 meetings between Xydas and the F.B.I. agents were provided to him (thus negating some of the reasons the government gave for refusing to allow him to see other reports of his contacts, see issue number I above). A reading of these reports (which will be submitted as part of

*Underlining added by appellant

a supplemental record), shows that Xydas did make a full disclosure to the agents of all the events connected with the French Poodle burglary and there was nothing in these reports to indicate that there was any prior knowledge of these facts on behalf of the F.B.I., nor that the F.B.I. had any prior suspicion of Xydas' involvement. In addition to this, over a year and a half elapsed after this meeting until Xydas was indicted.

In addition to the above, the court knew that the government had agreed prior to the trial to dismiss the conspiracy charge against Xydas, notwithstanding the fact that there was no order requiring them to do this. This voluntary dismissal[1] on the part of the government was notwithstanding the fact that Xydas' name was mentioned throughout the investigation of the Barnes case as a prime conspirator.

The repeated references to Xydas in this connection in other trials was an influence in the Court's decision regarding unproven charges and should not have been considered though they were widely made.

The fact that the court did consider these spurious charges was brought out by the following on pages 7 and 8 of the sentencing transcript,

The Defendant:
May I say something?

1. Page 9, Sentencing Transcript: Mr. Sullivan: Your Honor, at this time the government lodges its dismissal as to the remaining count of the indictment, the conspiracy count. The Court: The conspiracy count as to the Defendant Xydas will be dismissed.

The Court:
Certainly.

The Defendant:
I was trying to get in touch with the agent. That was my own contact. The men usually came to my store two or three times a week and this time he didn't.

I didn't have too much time between Saturday and Monday. It was only two days and so I had no time.

The Court:
This matter was fully determined by the jury.

The Defendant:
I didn't do it for any reason. I had no intention other than turning them in. I thought I had the guys apprehanded. I knew the one was wanted by the FBI. It was one of those things. I couldn't get in contact with the men. I made several efforts.

The Court:
You are not before the court in connection with the other charges. I believe the government will dismiss them.

Mr. Sullivan:
That is correct, Your Honor.

The Court:
Let me say that your name runs through the entire course of this conspiracy in the other trial.*

*Underlining added by appellant

Except for the four issues presented in this appeal, appellant reiterates what was said at the end of the trial, (Tr. Vol. VI. page 842):

> Mr. Lowe:
> I might say for the record, on behalf of Mr. Xydas and myself, that we feel we got a very fair trial and want to thank you, Your Honor.

IV

JUSTICE DEMANDS A NEW TRIAL FOR THE APPELLANT ON THE CHARGE OF INTERSTATE TRANSPORTATION OF STOLEN GOODS FOR WHICH HE WAS CONVICTED BECAUSE HIS DEFENSE WAS BASED ON THE QUESTION OF HIS PERSONAL INTEGRITY AND SENSE OF RESPONSIBILITY AND DESIRE TO HELP THE AUTHORITIES. THE QUESTION OF HIS MENTAL ATTITUDE WAS PRIMARILY WHAT THE JURY HAD TO CONSIDER IN DETERMINING INNOCENCE OR GUILT, THEREFORE HAVING THE EVIDENCE ADDUCED AGAINST HIM OF ARRANGING FOR THE HOUSEBREAKING OF A FRIEND AND CUSTOMER EVEN THOUGH HE WAS ACQUITTED OF THESE CHARGES COULD NOT HELP BUT BE A FACTOR THAT THE JURY NO MATTER HOW THEY TRIED COULD NOT ELIMINATE FROM THEIR MINDS.

In the present case against appellant Steve Xydas, he was originally charged with conspiracy, grand larceny and transportation of stolen goods. The Assistant U.S. Attorney in charge of the Barnes investigation stated to Commissioner Sam Wertlieb at Xydas' preliminary hearing on April 20, 1966, and this was quoted in all the D.C. newspapers the next day:

> "What has been shown, is that Steve Xydas manipulates an organized, large housebreaking ring..." Commissioner's Transcript, page 45, (which will be submitted as part of a supplemental record).

He also made numerous similar references throughout the trials of the case of U.S. v. Wallace, et. al. Cr. 486-66, and U.S. v. Klein, et al. Cr. 595-66.

1. Nevertheless, upon presentation of a Motion to Sever, without any ruling by the Court, the government voluntarily agreed to dismiss

the conspiracy count against Xydas on condition of going forward with the housebreaking and grand larceny (Haley) and transportation of stolen goods counts (French Poodle).

In the interest of keeping from being tried in the large conspiracy count Xydas was obliged to defend these other charges.

The government knew that Xydas had helped store the furs in the French Poodle case and that Xydas had to defend on the ground that his participation was not unlawful; and it also knew that Xydas was the one who had told the FBI who committed the French Poodle theft and that his defense could only be that he was helping Barnes and Skeens in order to trap them.[1]

Therefore, Xydas' character, credibility, reliability and due diligence was the issue in the French Poodle charge. There was nothing in Xydas' record that could be used to impeach him when he took the witness stand. And there were admissible, or at least provable dealings with the F.B.I. since 1959, and therefore, a strong likelihood of acquittal.

However, interjected during the trial, throughout the Pat Haley counts of housebreaking and grand larceny was evidence of Xydas' petty gambling activities and the odious charge of setting up (Pat Haley), a good friend and customer to be robbed.

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1. It is likely that the F.B.I. record, unavailable to the defense, shows previous information given by Xydas to the F.B.I. concerning Skeens' activities.

If this Honorable Court will consider the teaching of the Bruton case[2] (though the facts have no similarity) it is apparent that the jury's verdict of guilty in the French Poodle count might very well have been caused by the evidence in the Haley case notwithstanding the not guilty verdicts on those two counts of housebreaking and grand larceny.

We now come to the crucial question which, if the Court agrees with Xydas, requires a reversal and a new trial of the only blot in the entire Barnes investigation against Xydas, the French Poodle conviction.

Did the government have sufficient knowledge that Xydas was not guilty of the Haley charge to require them in all fairness not to try him simultaneously on these charges knowing the highly emotional and prejudicial affect the Haley evidence would have on the jury in its deliberation concerning the French Poodle defense of lawful activity in the interest of continuing the long established custom of informing for the F.B.I.

1. At the commencement of the trial the government had in its possession a letter to former United States Attorney, David Acheson, from Barnes, sent July 1965, in which he gave one version of the Haley housebreaking, and the prosecuting attorney was present at the preliminary hearing in which Barnes gave an entirely different version

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2. Bruton v. U.S. 391 US. 123.

on substantial elements of the housebreaking which he could not be mistaken about. The reference in the letter to David Acheson is as follows:

> '3. Woman that lives across from No. 9 station, but moved to Cheverly Terrace Apts. Steve Xydas called Skinner, told him to bring me down to his Bar. I went down there with Skinner and Steve said a guy name Earl would be down with a score in a few minutes. He said a broad hit the no. a day or so before, but he didn't know where she kept the money, but Earl had found out. Earl came in and asked Skinner and Steve if I could open the apartment door. He was assured I could. Earl then said he had stayed with the woman the night before and that she had the money in the bedroom in the dresser drawer. He said that it would bea four way split as it was such an easy score. Skinner and Earl went with me and showed me the apt. no. then they went down-stairs to wait. It was raining. I got $1,600.00 and we split it up at Steve's $400.00 a piece. Later the broad told Earl I left some money in a boot, also told Steve I never took her rings."

At the preliminary hearing Barnes said he did not know where the money was kept and that it took him about 40 minutes to find it in the dresser drawer, after ransacking and demolishing the apartment, and that because of this a fair split was $1,000 to him and $200 apiece to the other three. Commissioner's Hearing Transcript,

Page 20,
Barnes:

> "After I burglarized the house I came back down and I met the other man and Skeens and Earl at Joe's--Steve's Restaurant, and I gave them $200 apiece."

Page 21,

Mr. Lowe:

"Did Beaman at that time, tell you exactly where the money was?"

Barnes:

"He didn't know where the money was."

Mr. Lowe:

"He didn't know?"

Barnes:

"No; he knew it was in the apartment, but he didn't know exactly where."

Page 26,

Mr. Lowe:

"Where was the first place you looked when you got into the apartment?"

Barnes:

"In the closet."

Mr. Lowe:

"Did you take the things down, or leave them the way they were?"

Barnes:

"I demolished her apartment."

Mr. Lowe:

"You demolished her apartment in order to find what you were looking for, is that right?"

Barnes:

"By "demolished", I mean I took everything out that I thought would have money in it."

Mr. Lowe:

"Almost everything in that apartment was ransacked before you found it, is that correct?"

Barnes:

"Yes, sir."

Mr. Lowe:

"And then you finally found it where?"

Barnes:

"In a manila envelope, in the top dresser drawer."

Page 30,
Mr. Lowe:
"How long were you in that apartment?"
Barnes:
"About forty minutes."
Mr. Lowe:
"And all the time you were working, trying to find the money, right?"
Barnes:
"Yes, sir."

Page 33,
Mr. Lowe:
"I want to know whether Mr. Beaman told you where the money was in the apartment?"
Barnes:
"No."

Page 34,
Barnes:
"Nobody knew where it was, except that it was in the apartment."

Page 37,
Mr. Price:
"How much money did you keep?"
Barnes:
"Kept the rest of it."
Mr. Price:
"How much was the rest?"
Barnes:
"$1,000."
Mr. Price:
"This was their plan; they knew about it, and it was your thousand?"
Barnes:
"I was supposed to keep a thousand."

Page 40,
Mr. Price:
"Did Mr. Beaman tell you where the money was?"
Barnes:
"No, sir."
Mr. Price:
"Did he say he didn't know, or just didn't mention it between you?"

Barnes:

"Said he didn't know where the money was at, but he said he knew it was there."

Page 43,

Mr. Lowe:

"Up to that point, there was no understanding as to how the proceeds were to be split up?"

Barnes:

"No, sir."

Mr. Lowe:

"And then did you discuss with them how much each one was to get, or did you give them whatever you wanted?"

Barnes:

"We came to a mutual agreement, that $200 was a fair share for each of them."

Mr. Lowe:

"Mutual Agreement. Did you have a discussion on this subject?"

Barnes:

"We got back to the restaurant and I counted the money, and like I said, there was $1600, maybe a little more, I don't recall, and I gave each $200 apiece, and there wasn't nothing said, either way."

Mr. Lowe:

"Then there was no discussion?"

Barnes:

"It was, like I said, it was just mutual. I handed him $200 and he was satisfied."

Mr. Lowe:

"And that was what happened with all of them?"

Barnes:

"Yes, sir."

In each case, however, Barnes did say that Skeens was a participant which brings us to the second bit of knowledge that the government had.

2. At the commencement of the trial, the Government had a transcript of Skeens' sworn te stimony before the Grand Jury (pages 1883-1884) on January 10, 1966, in which he told the Grand Jury that Xydas didn't have anything to do with the Haley housebreaking. It reads as follows:

Sullivan:
Q Do you know whether Steve Xydas had anything to do with the setting up of the burglary of the Pat Haley apartment across from the No. 9 Presinct?

Skeens:
A No, sir. I don't think he did.

Q You don't think that he did?

A No, sir.

Q Do you know who did that burglary?

A No, sir.

Q Barnes claims that he actually went into the apartment; that you were physically present in the area at the time that happened. Is that correct?

A Yes, sir.

Q He states that Earl Beeman was also present in the area at that time. Is that likewise correct?

A No, sir. It isn't.

Q Beeman was not present?

A Not present at that time.

Q I see. Beeman according to Barnes' information, knew about Pat Haley going to be away from her apartment

at the time that Barnes actually burglarized it. Had you ever heard that from Beeman?

A No, sir.

Q Did Beeman know about the planned burglary before it actually took place?

A Yes, sir.

Q According to Pat Haley she actually won money from Xydas on the numbers just some weeks before she was burglarized.

A Yes, sir. Coming back to Xydas on that, I think he talked to Barnes previously to that, that she had won some money.

Q I see.

A As far as him knowing that he set up the job, I don't know that.

Q But from your information, Xydas told Barnes that Pat Haley had won money. Is that correct?

A That is correct.

Attempt was made by the defendant to get this important information to the jury through Skeens and also through the prosecuting attorney, to no avail. (Tr. Vol. IV, pages 409-429).

3. At the commencement of the trial the government had a tape recording of a telephone conversation between Skeens and Xydas which was referred to above in statement of questions presentedNo. 2. In this statement, Xydas flatly denied to Skeens any participation on his part in the Haley matter and it is obvious that if these two had participated as it was claimed, Xydas would not be in a position to deny it directly to Skeens.

4. In its opening statement, the government claimed that Baker would testify that Xydas admitted the Haley housebreaking,[3] notwithstanding the fact that Bakerneither in his Grand Jury testimoney nor in his statement to the Internal Investigation Unit that were turned over to the defense ever made such a statement nor did he so testify in Xydas' trial.

5. The government at the commencement of the trial had a statement (Government Exhibit No. 2 in identification) by Martha Painter made to the Internal Investigation Unit in which she stated: that at the time of the Haley housebreaking Xydas was at the

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3. Tr. Vol. I, page 96:
You will hear, for example, from witnesses such as Harold Baker, who was likewise a burglar, although he recently has been driving a truck and selling and working at some legitimate work in the Washington area for the last couple of years, you will hear from him that he was a burglar at the time and that shortly after the Pat Haley housebreaking the defendant Xydas acknowledged his part in it and spoke about the silver dollars which he was adding to his coin collection.

Shennandoah Racetrack (Tr. Vol. IV, pages 396-397, 401-403).

With all the above exculpatory information the government went forward and filled the trial with numerous references to gambling and the numbers racket as detailed above in the statement of the case.

So that out of all the accusations, smears and charges against Xydas we really have against him only that he was not diligent enough in reporting to the F.B.I. the details of the French Poodle burglary and the answer to that, the question of diligence, is a subjective thing and Xydas should have an opportunity, without other prejudicial evidence before the jury who must decide what his state of mind was, to demonstrate that for him he used due diligence.

This device outlined above may be an often used one and where it results in a likelihood of inherent unfairness in prejudicing a jury to decide a case on other than its particular merits, it becomes a question of lack of due process.

The "Barnes" case is replete with this device.

In the first case, U.S. v. Wallace et al. Cr. 486-66,[4] the damaging tape of one co-defendant (Officer Donohue) was used in a flagrant way against two co-defendants (Wallace and Bowie) who were found guilty. The two acquitted police officers were not mentioned in

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4. Presently awaiting decision by a division of this Honorable Court, oral argument having been heard, Nos. 21134, 21135, 21136.

that tape. Not only that, but this crucial tape was withheld until after Wallace had completed putting on his defense witnesses and testifying himself.

And in the case of U.S. v. Klein, et al. 595-66,[5] the evidence of a particular burglary by a co-defendant (Hamilton) who was already convicted of that crime was virtually the only corroboration of the voluminous charges and testimony of the government's star witness, Robert Earl Barnes. The evidence presented by the Government in this conspiracy count was almost identical to the evidence presented in the previous trial where Hamilton was convicted. Of the 40 overt acts listed in the conspiracy charge this particular one was not even mentioned.

And the dismissal of the conspiracy count against Xydas was subject to his being tried on the remaining counts and was not to be dismissed until judgment was entered on these counts.

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5. Presently being appealed. Briefs required to be filed same schedule as instant case, Nos. 21892, 21894, 21895, 21889.

FIRST PROPOSED STIPULATION (Court's Exhibit No. 1)

It is agreed and stipulated between counsel for the defendant Xydas and counsel for the United States that on June 25, 1959, the defendant Xydas was first contacted by a Special Agent of the FBI concerning the possibility of his furnishing information to the FBI on a confidential basis. Inasmuch as he displayed a willingness to supply such information, he was thereafter contacted either at his request or at the request of various Special Agents on the following dates: 7/20/59; 7/23/59; 8/8/59; 9/22/59; 10/1/59; and 10/23/59. On 11/13/59 contact with defendant Xydas was terminated since, in the judgment of the FBI, the contacts had not produced information of value to the FBI.

Contacts with the defendant Xydas were re-instituted by the FBI on 9/23/60 and he was thereafter contacted on the following dates: 9/28/60; 11/2/60; 12/12/60; 1/9/61; 1/13/61; 2/4/61; 2/21/61; 3/10/61/ 4/7/61; 4/12/61; 5/9/61; 6/5/61; 6/22/61; 7/11/61; 7/17/61; 8/18/61; 9/26/61; 10/2/61; 10/6/61; 11/17/61; 12/14/61; 1/18/62; 2/4/62; 3/21/62; 4/19/62; 5/14/62; 5/14/62; 6/26/62; 8/9/62; 9/6/62; 9/24/62; 10/22/62; 11/16/62; 12/31/62; 1/21/63; 2/28/63; 4/2/63; 5/3/63; 5/6/63; 5/7/63; 6/12/63; 6/18/63; 6/19/63; 6/27/63; 7/8/63; 8/5/63; 8/23/63; 9/4/63; 9/23/63; 11/4/63; 11/5/63; 11/7/63; 11/21/63; 11/23/63; 11/24/63; 12/5/63; 1/10/64; 2/18/64; 3/10/64; 4/9/64; 4/10/64; 5/14/64. On the latter date contacts with defendant Xydas were again terminated since in the judgment of the FBI the

contacts had not produced information of value to the FBI.

On 9/15/64, the defendant Xydas contacted Special Agents of the FBI and furnished information concerning the burglary of the French Poodle Dress Shop and a robbery in Ellicott City, Md. Xydas took initiative in this contact, having come to the Washington Field Office of the FBI. Since this information implicated the defendant Xydas in these offenses, he was accordingly warned of his rights including his right not to incriminate himself and of his right to consult counsel. He thereafter voluntarily furnished information concerning thiese offenses. He was also interviewed about these matters 9/16/64, 9/22/64, 9/23/64, 10/2/64, 11/3/64, which interviews were not regarded by the FBI as confidential in nature, since defendant Xydas, according to his statements, was himself implicated in these offenses. He was not then being "operated" as an informant.

On 12/2/64 defendant Xydas was recontacted to review attempts to develop him as an informant concerning these and other matters. He was thereafter contacted on the following dates: 12/3/64; 12/8/64; 12/9/64; 1/9/65; 2/8/65; 3/8/65; 3/15/65; 4/6/65; 4/29/65; 6/8/65; 6/22/65; 7/20/65; 8/19/65; 9/15/65; 10/5/65; 11/5/65. Since, in the judgment of the FBI, the contacts had not produced information of value to the FBI and since Xydas was then under investigation concerning his possible violation of the Mann Act, contacts on a confidential basis were ceased as of 11/18/65.

The defendant Xydas was interviewed by Special Agents of the FBI on 11/23/65 concerning his alleged involvement in the Mann Act

violation, after being advised of various Constitutional Rights.

Since regular contact was ceased by the FBI on 11/18/65, no further effort was made to develop Xydas as an informant. However, on 1/17/66, the defendant Xydas contacted an agent of the FBI concerning an investigation currently being conducted by the Internal Investigative Unit of the Washington, D.C. Metropolitan Police Department. Xydas was encouraged to furnish his information directly to Assistant United States Attorney Harold J. Sullivan. A similar contact was again made 5/2/66, upon Xydas' initiative. On 10/12/66 Xydas advised a Special Agent of the FBI concerning his repurchase of a gun he felt had been previously stolen from him. And on 10/14/66, the defendant Xydas furnished information to a Special Agent of the FBI concerning an offense against the laws of Maryland.

Many of the above referred to contacts resulted in obtaining no information concerning the matters inquired into or merely non specific, general information. As regards the information supplied to the FBI by the defendant Xydas as a result of the contacts since 1959, it has largely concerned gambling matters and had been of general intelligence-type information concerning his friends and associates. At all times when the defendant Xydas furnished information concerning his involvement in offenses, he was first advised of his right not to incriminate himself and of his right to counsel.

No record exists that defendant Xydas ever reported to

the FBI any information concerning the Pat Haley housebreaking and grand larceny, charged in counts one and two, prior to his being charged with complicity in the offense.

IRA M. LOWE
Attorney for Steve P. Xydas

HAROLD J. SULLIVAN
Assistant United States Attorney

SECOND PROPOSED STIPULATION (Court's Exhibit No. 2)

It is agreed and stipulated between counsel for the defendant Xydas and counsel for the United States that on June 25, 1959, the defendant Xydas was first contacted by a Special Agent of the FBI concerning the possibility of his furnishing information to the FBI on a confidential basis. Inasmuch as he displayed a willingness to supply such information, he was thereafter contacted either at his request or at the request of various Special Agents on the following dates: 7/20/59; 7/23/59; 8/8/59; 9/22/59; 10/1/59; and 10/23/59. On 11/13/59 contact with defendant Xydas was terminated.

Contacts with the defendant Xydas were re-instituted by the FBI on 9/23/60 and he was thereafter contacted on the following dates: 9/28/60; 11/2/60; 12/12/60; 1/19/61; 1/13/61; 2/4/61; 2/21/61; 3/10/61; 4/7/61; 4/12/61; 5/9/61; 6/5/61; 6/22/61; 7/11/61; 7/17/61; 8/18/61; 9/26/61; 10/2/61; 10/6/61; 11/17/61; 12/14/61; 1/18/62; 2/4/62; 3/21/62; 4/19/62; 5/14/62; 6/26/62; 8/9/62; 9/6/62; 9/24/62; 10/22/62; 11/16/62; 12/31/62; 1/21/63; 2/28/63; 4/2/63; 5/3/63; 5/6/63; 5/7/63; 6/12/63; 6/18/63; 6/19/63;

6/23/63; 7/8/63; 8/5/63; 8/23/63; 9/4/63; 9/23/63; 11/4/63; 11/5/63; 11/7/63; 11/21/63; 11/23/63; 11/24/63; 12/5/63; 1/10/64; 2/18/64; 3/10/64; 4/9/64; 4/10/64; 5/14/64. On the latter date contacts with defendant Xydas were again terminated.

On 9/15/64, the defendant Xydas contacted Special Agents of the FBI and furnished information concerning the burglary of the French Poodle Dress Shop and a robbery in Ellicott City, Md. Xydas took the initiative in this contact, having come to the Washington Field Office of the FBI. He was also interviewed about these matters 9/16/64, 9/22/64, 9/23/64, 10/2/64, 11/3/64, during which interviews he was not then being "operated" as an informant.

On 12/2/64 defendant Xydas was recontacted to renew attempts to develop him as an informant concerning these and other matters. He was thereafter contacted on the following dates: 12/3/64; 12/8/64; 12/9/64; 1/9/65; 2/8/65; 3/8/65; 3/15/65; 4/6/65; 4/29/65; 6/8/65; 6/22/65; 7/20/65; 8/19/65; 9/15/65; 10/5/65; 11/5/65.

Since regular contact was ceased by the FBI on 11/18/65, no further effort was made to develop Xydas as an informant. However, on 1/7/66, the defendant Xydas contacted an agent of the FBI concerning an investigation currently being conducted by the Internal Investigative Unit of the Washington, D.C. Metropolitan Police Department. A similar contact was again made 5/2/66, upon Xydas' initiative. On 10/12/66 Xydas advised a Special Agent of the FBI concerning his repurchase of a gun he felt had been previously stolen from him. And

on 10/14/66, the defendant Xydas furnished information to a Special Agent of the FBI concerning an offense against the laws of Maryland.

Some of the above referred to contacts beginning in 1959 resulted in obtaining no information concerning the matters inquired into and some resulted in obtaining merely non-specific, general information. The information supplied to the FBI by the defendant Xydas, as a result of the contacts since 1959, has largely concerned gambling matters and has been of general intelligence-type information concerning his associates.

No record exists that defendant Xydas ever reported to the FBI any information concerning the Pat Haley housebreaking and grand larceny, charged in counts one and two, prior to his being charged with complicity in the offense.

IRA M. LOWE
Attorney for Steve P. Xydas

HAROLD J. SULLIVAN
Assistant United States Attorney

STIPULATION ENTERED INTO EVIDENCE

It is agreed and stipulated between counsel for the defendant Xydas and counsel for the United States that on June 25, 1959, the defendant Xydas was first contacted by a Special Agent of the FBI concerning the possibility of his furnishing information to the FBI

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Carl Giovanetti

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Richard Marquise

Edward Wills

then being "operated" as an informant.

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Some of the above referred to contacts beginning in 1959 resulted in obtaining no information concerning the matters inquired into and some resulted in obtaining merely non-specific, general information. The information supplied to the FBI by the defendant Xydas, as a result of the contacts since 1959, has largely concerned gambling matters and has been of general intelligence-type information concerning his associates.

IRA M. LOWE
Attorney for Steve P. Xydas

HAROLD J. SULLIVAN
Assistant United States Attorney

CONCLUSION

For the foregoing reasons it is respectfully submitted that a new trial be granted to Appellant Xydas.

Respectfully submitted,

Ira M. Lowe

IRA M. LOWE
Attorney for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,893

STEVE XYDAS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
HAROLD J. SULLIVAN,
Assistant United States Attorneys.

Cr. No. 595-66

INDEX

TABLE OF CASES

Cases—Continued

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Did the trial court correctly review, *in camera*, FBI informants' files from other investigations and properly condition appellant's access to these files?
2. Did the trial court correctly rule inadmissible certain self-serving recorded statements of appellant?
3. Did the trial court correctly permit, without defense objection, a single trial of the appellant on similar offenses constituting part of a common scheme?
4. Did the trial court correctly consider all relevant factors in imposing sentence?

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* This case has not previously been before this Court. However, a group of companion cases involving four of appellant's co-defendants in the District Court is presently pending before this Court, docketed as *Hamilton et al.* v. *United States*, Nos. 21,889, 21,892, 21,894 and 21,895. Appellant Xydas was granted a severance by the District Court and went to trial separately.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,893

STEVE XYDAS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant and fifteen co-defendants were charged in an eleven-count indictment filed on May 3, 1966. All named defendants were alleged to have committed violations of the conspiracy statute and, in addition, certain substantive violations including housebreaking and grand larceny. Appellant, upon his motion, was tried separately on three counts of the indictment, renumbered as follows:

(1) Count one, charging appellant with the May 1964 Haley housebreaking;

(2) Count two, charging appellant with grand larceny in connection with the Haley housebreaking; and

(3) Count three, charging appellant Xydas with interstate transportation of property stolen in the August 1964 French Poodle housebreaking.

Appellant was tried by jury before the Honorable John Lewis Smith, Jr., between September 20 and September 28, 1967. Appellant was acquitted on counts one and two and was found guilty on count three. On January 2, 1968, appellant's motion for new trial was heard and denied by Judge Smith. On January 19, 1968, appellant was sentenced to a term of imprisonment of one to three years. This appeal followed. Before this Court appellant is represented by the same counsel he retained for the trial.

Pre-Trial Proceedings

From September 12 through September 19, 1967, the final pre-trial proceedings as regards appellant Xydas were conducted (PT 1-273), and the following matters were resolved:

Severance

Upon appellant's motion to sever the conspiracy count and the Government's acquiescence, a separate trial was ordered on the three substantive offenses in which he was charged in the original indictment (PT 24, 57). It was agreed that the conspiracy count as to appellant would be dismissed after judgment should a verdict of guilty be returned on the substantive counts (PT 24, 58).

Production of Grand Jury Testimony

Pursuant to a pre-trial order and stipulation[1] the Government submitted to the court on September 12, 1967, the grand jury testimony of Robert Earl Barnes *in toto* for *in camera* review (PT 29). The Government suggested certain limited portions not be produced (PT

[1] On July 21, 1967, appellant's counsel agreed to the terms of the pre-trial order and stipulation; it was signed by appellant (Tr. 78), and on September 15, 1967, appellant reaffirmed that he had no objection to its terms (PT 88).

30). For three full days the court reviewed Barnes' grand jury testimony (PT 130). The defense then specifically requested all the grand jury testimony "concerned with these two housebreakings" (*i.e.*, Haley and the French Poodle). (PT 137). Particularly the testimony of witnesses Skeens, Beaman, Hamilton and Baker was sought (PT 44). On this request the court followed the same procedure as with the Barnes testimony (PT 129). Production of that testimony had been ordered except as to "three categories of extraneous matters: information unrelated to the instant charges, matters unrelated to the present trial and currently under investigation, and matters pertaining to individuals identified in the testimony who are entitled to protection from adverse publicity attendant on having their names raised in connection with the instant case. In addition the Court finds that certain materials should be made available to counsel for the defense, the nature of which dictates caution in introducing it in evidence." (Court's Exhibit One.) Appellant himself had not testified before the grand jury (PT 9).

Production of Appellant's Statements

All reports in which appellant's statements relating to the Haley and French Poodle housebreakings are set forth were turned over in advance of trial (PT 81). Appellant's written statement was produced without objection (PT 5), as were the police reports of his three oral statements given during the investigation (PT 6). In addition, the FBI reports reflecting all of appellant's statements to the Bureau concerning the case were produced one week in advance of trial (PT 6). A copy of a waiver signed by appellant concerning property stolen in the French Poodle housebreaking and recovered from him was also produced at that time (PT 6).

Production of Tape Recordings

There were two covert recordings made of appellant's conversations with the Government's undercover agent

Skeens (PT 3). Both were made available to appellant one week in advance of trial (PT 5). Further, the Government offered to state whether recordings had been obtained of conversations of any person identified by defense counsel as a prospective defense witness (PT 34-35). The conversations of only one such prospective witness (*i.e.*, Marsha Skeens) concerning the subject matter of the case had been recorded (PT 38). This recording was likewise played for the defense in advance of trial (PT 75-76).

Production of Brady-Levin *Material*

The Government, upon review of its entire file, reported it found no evidence favorable to appellant and material to the charges that had not been turned over to the defense (PT 15, 85). On the showing made to the trial court, the court ruled, "[T]here is certainly no suppression by the prosecution in this case, and the Court finds no negligence or no negligent non-disclosure" (PT 154).

Production of FBI Informants' File

On September 11, 1967, the defense subpoenaed the Director, J. Edgar Hoover, and certain records of the FBI.[2] Appellant's counsel stated:

> The purpose of subpoenaing these records is to show . . . that Mr. Xydas was cooperating with the FBI and helping them since 1959. And this may become important if there should be a denial, for example, that this was done and, therefore, I would like to see the reports, and see if the reports do not reflect that he cooperated with the FBI since 1959. (PT 12-13.)

Showing "continuity of contacts" was another stated purpose. (PT 217).

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[2] This subpoena was later withdrawn after the Government provided two affidavits from special agents of the FBI which made available the desired information (PT 142-143).

At another point defense counsel added:

> I want to see those records. I want to see when Xydas spoke to the FBI. I don't care about the contents of all of them necessarily. I may be concerned with them, I may not. (PT 82.)

More specifically, the defense counsel continued:

> I want the FBI records just for me to look over with regard to dates. Our defense is that . . . Xydas was, in fact, helping the FBI, and I have to have some background of that. I have to know the dates. (PT 138.)

Finally, on the stated purpose for the subpoenas, this colloquy occurred:

> THE COURT: What do you expect to develop from the use of the FBI records?
>
> MR. LOWE [defense counsel]: That Xydas on many occasions did, in fact, talk to the FBI, some that were not even reported probably some general statements he made; but we want to confirm that there were discussions from time to time with the FBI over a period of years, with several of the FBI agents, at which time he gave them information . . . . So it's vitally important to corroborate at least that there were these meetings and have a record of the times that they met and who was present and that kind of information. (PT 152.)

In response to the subpoena, an agent of the FBI appeared in open court and brought with him all of the FBI files covered by the subpoenas (PT 202-203). The Government offered a proposed stipulation (PT 205) but opposed wholesale production on grounds of confidentiality and lack of a showing of materiality and relevancy (PT 203). Moreover, the Government represented that with the possible exception of material previously turned over to the defense, the files contained nothing of an exculpatory nature (PT 206-207).

The trial court, while expressly demonstrating its cognizance of the teaching of *Dennis, infra* note 10, con-

cluded it was in a position to determine the relevancy of the subpoenaed documents (PT 217). After a several hour review of the documents *in camera* the Court concluded:

> There is nothing vitally important to you [the defense] contained in those records, but first the Court finds there has been no showing of a particularized need for the disclosure of these confidential records of the Federal Bureau of Investigation. There is nothing of an exculpatory nature contained therein, and there is nothing that is material or revelant to the indictment in the pending case. As I previously pointed out, many of these contacts referred to a period of time long before the present offenses were even committed, and had no connection whatsoever with that offense.

Accordingly, the Court granted the Government's motion to quash the subpoena (PT 224).

Prior to the trial court's quashing of the subpoena, the Government voluntarily had offered a stipulation as to certain facts reflected in the FBI informants' file (PT 205). In the stipulation thereupon entered there was set forth:

(a) the fact of appellant's displayed willingness expressed in June of 1959 to provide information on a confidential basis;
(b) the names of the FBI agents with whom appellant had been in contact;
(c) the dates of each such contact as reflected in the FBI files;
(d) the pertinent instances in which appellant took the initiative in making the contacts; and
(e) a description of the subject matter of the information provided by appellant (Tr. 353-357).

Miscellaneous Discovery

During the final pre-trial proceedings miscellaneous additional discovery was voluntarily effected by the Gov-

ernment (police forms, (PT 8), certain *pro se* motions (PT 56), criminal records of witnesses (PT 272)). Thereafter, during the course of the trial, the Court observed: "I think there has been fairness and full disclosure" (Tr. 382).

The Trial

The Prosecution's Case

In the latter part of December 1963, Robert Earl Barnes arrived in the District of Columbia (Tr. 286). He was then thirty years old. Ever since he had been a juvenile, Barnes' business had been burglary (Tr. 287). Within a week or two this professional burglar had made contact with appellant at the latter's restaurant (Tr. 287).

The Haley Housebreaking

Two months later appellant called Barnes at his home and told him to come to the restaurant because "he had something lined up." The date was May 13, 1964 (Tr. 288). Barnes went to appellant's restaurant and there met with appellant, "Skinner" (James T. Skeens) and one Earl Beaman (Tr. 289). Appellant advised Barnes that Earl Beaman's girl friend had "hit the number" for $1,600 and had showed Beaman the money in her apartment. Armed with this information and accompanied by Skeens and Beaman, Barnes burglarized the apartment of Pat Haley at 518 9th Street, N.E. (Tr. 288, 290) and stole the $1,600 in bills and some silver dollars (Tr. 291). Appellant was paid $200 by Barnes because it was part of his " 'score' " (Tr. 291) (*i.e.*, "It was 'his house,' you know. He helped 'set it up.' He had that coming." (Tr. 291)).[3]

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[3] On cross-examination certain slight inconsistencies were pointed up between Barnes' testimony on direct examination and earlier statements in other forums. This was made quite understandable to the jury on redirect examination, where it was developed that Barnes had testified "countless other times" before the grand jury

Pat Haley testified that during May of 1964 she worked as a waitress and lived at 518 9th street, N.E. (Tr. 146). She knew appellant, frequented his restaurant and "did play the numbers" with him. (Tr. 148). Around that time on two occasions she played 789, her tag number, and 902, that of a friend (Tr. 148-149). Each time she won $600 and she collected from appellant (Tr. 149). Just before May 13, 1969, the winnings, along with another several hundred dollars (Tr. 151) and some silver dollars (Tr. 152), were hidden in her apartment (Tr. 151-152). She told no one the money was hidden there (Tr. 159). However, at that time she was friendly with an Earl Beaman who on occasion had visited her at home (Tr. 153).

Metropolitan Police Inspector William Foran was offered as an expert in the field of gambling (Tr. 126-144). His expertise was stipulated (Tr. 129-130). Thereupon, he explained the operation of the "numbers game" (Tr. 131-136) and testified that 789 and 902 were the winning numbers on March 20 and April 2, respectively (Tr. 135-136).

In further corroboration, Harold Baker testified that he was a truck driver and truck salesman. He knew Barnes and in fact was introduced to him by appellant (Tr. 236). The next day or two after the Haley burglary, Baker saw Barnes in appellant's restaurant and heard Barnes and appellant discussing "the fact that Pat Haley had lost some money and Barnes said 'Yes, but you won the silver dollars'" (Tr. 239). As they said this, appellant and Barnes were "laughing about it." During this same general period, Baker said, he knew Skeens and Beaman and saw them in appellant's restaurant too (Tr. 241-242).

(Tr. 331) and made statements involving details of this and other crimes (Tr. 332) among the hundreds of burglaries (Tr. 334) he committed over a fourteen-month period in the Washington area. Moreover, before his testimony he had neither read nor had read to him the various documents which were the basis of the cross-examination (Tr. 335). Specifically, these included grand jury testimony, defendant's exhibit three, and the testimony in the *Wallace* trial (Tr. 335-337).

The French Poodle Case

A couple months after the Haley housebreaking, in August of 1964, Barnes was still operating as a burglar in the Washington area. One of his burglaries that month was at The French Poodle, a dress and fur shop located at 1211 Connecticut Avenue, N.W. (Tr. 292).

Mrs. Louella Epstein testified she was the owner of ladies' apparel shops trading as The French Poodle (Tr. 183). On August 23, 1964, she discovered that her store at 1211 Connecticut Avenue, N.W. had been burglarized. More than seventy stoles, twenty to twenty-five mink coats, jackets and fur pieces were taken (Tr. 189). The wholesale value of the property stolen was in excess of $50,000 (Tr. 188). Unique yellow garment bags, handmade by her father, were used to cover much of her merchandise. Only a few of the stolen items were recovered (Tr. 192). The burglars had entered through a second-story window and chopped a hole in the French Poodle ceiling (Tr. 171-172).

On August 22, the morning of the burglary, Barnes testified, he called appellant and said: "I told you that I was going to make the French Poodle and that I had to have a place to store the furs until I could get a buyer down from New York" (Tr. 293). Appellant told him to "bring them out to his house [located in Maryland] and put them in his basement" (Tr. 293). With these arrangements made, Barnes "cased" the French Poodle and then, accompanied by Harold Baker and Bobby Hamilton, burglarized it (Tr. 294-295). They entered through a second-story window (Tr. 245-246), chopped a hole in the inside roof, hoisted up the furs and other garments (Tr. 246, 296), loaded them into a truck rented by Baker (Tr. 243, 294) and drove it into Maryland (Tr. 297). The burglars went first to Skeens' house briefly (Tr. 238, 297) and then to appellant's to store the furs as had been perarranged. Appellant, however, balked at the large quantity of furs, complaining that he thought there would only be "25 or 30 furs" (Tr. 297). Appellant said his wife would raise "all kinds of cane [*sic*]"

and suggested instead that his sister's garage would be an ideal spot (Tr. 298). He accompanied the burglars there, and the furs were unloaded into that garage (Tr. 298). For four days until they were sold the furs remained in appellant's sister's garage (Tr. 299). Barnes paid appellant, he said, for his role with two of the stolen furs (Tr. 300).

The Defense

In defense appellant produced several witnesses. Concerning the Haley housebreaking, Bennie Cameron stated appellant "could have been" at the race track on the evening of May 13 (Tr. 389-391). Another witness, Lela Painter, recalled telling appellant of the Haley housebreaking the evening of the offense (Tr. 398).

Several FBI agents were called as defense witnesses. Agent Franklin had had contacts with appellant in 1959 (Tr. 434) but had never been given information on the Haley or French Poodle offenses (Tr. 437-438). Agent Giovanetti received information from appellant in contacts between 1960 and 1964 (Tr. 443). His last contact in the spring of 1964 did not provide any information concerning the offense, and Giovanetti recommended that Bureau contact with appellant be terminated (Tr. 448). After the August 23 French Poodle offense, appellant did not report it to Giovanetti (Tr. 448), but about three weeks later appellant went to him in the Washington Hospital Center, where he was a patient (Tr. 443-444), and was referred to another agent (Tr. 445). Agents Wills and Marquise testified they thereupon interviewed appellant on September 15 and 16, 1964 (Tr. 445, 460). Their first message to call appellant was received on September 15 (Tr. 459). Thereafter in mid-September 1964 two additional FBI agents, Weimer and Wanger, met at appellant's sister's home in the Riverdale, Maryland, area, where the furs had been stored (Tr. 476-478). They brought a camera (Tr. 477), since they had been invited to take pictures (Tr. 479), but they got none (Tr. 478). They had not been invited to come and take

pictures around the time the furs were stored there (Tr. 478).

At the conclusion of the trial, appellant through his counsel commended the trial court:

> I might say for the record on behalf of Mr. Xydas and myself, that we feel we got a very fair trial and want to thank you, Your Honor. (Tr. 842.)

ARGUMENT

I. The trial court correctly reviewed the subpoenaed informants' files from other investigations *in camera*, and properly conditioned appellant's access to these files.

Appellant attempted discovery of all reports filed by FBI agents concerning contacts which they had with him since 1959. This information was sought through subpoena of the Director of the FBI and certain of his records. A stipulation was entered into when the subpoenas were quashed by the trial judge, upon motion by the Government, on the grounds that (1) appellant had failed to show a particularized need for the files; (2) nothing relevant nor material to the present case was contained therein, not even of an exculpatory nature; and (3) the documents sought were confidential records and reports of the FBI and so were privileged (PT 224). The quashing of appellant's subpoenas was proper on any of the grounds set forth by the trial judge.

Amended Rule 16 of the Federal Rules of Criminal Procedure sets forth the boundaries of requested discovery in federal criminal cases.[4] Rule 16 (a) describes

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[4] Rule 17(c), which authorizes the use of a subpoena *duces tecum* in criminal cases, is simply an alternate method of obtaining the document to the motion of Rule 16. A member of the original Advisory Committee has said the purpose of this provision "was not to grant additional discovery, but merely to facilitate and expedite trials, in order that a trial may not be delayed while counsel are examining voluminous documents . . . ." *United States* v. *Carter*, 15 F.R.D. 367, 369 (D.D.C. 1954). *Cf. Bowman Dairy Co.* v. *United*

the relatively easy discovery available for (1) the defendant's own written or recorded statements or confessions, or copies thereof; (2) physical or mental examination reports connected with the case; and (3) recorded testimony of the defendant before the grand jury. The reports sought by appellant at trial do not fit the categories of Rule 16 (a), since they are reports made by agents in a manner prescribed by the Bureau and are not limited to transcriptions of statements made by appellant to the agents. The fact that substantially more than transcription of appellant's words is contained in the reports sought removes them from Rule 16 (a).[5]

Failing production via Rule 16 (a), appellant must travel the more arduous path prescribed by Rule 16 (b). While this rule includes nearly every kind of item imaginable, it must be (1) material, (2) in the possession or control of the Government, and (3) reasonable that the Government produce it.

Upon an *in camera* review of the documents sought here, the trial court held they were not material. This Court will have the opportunity for review and will consider the arguments for production heretofore advanced by appellant. Appellee would only point out the *in camera* nature of the consideration to be given by this Court to the propriety of the District Court's ruling. The inadequacy of the showing of materiality made by counsel for appellant becomes clear when the complete speculation upon which this attempted showing is based is seen as

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States, 341 U.S. 214, 220 (1951); *United States* v. *Ferguson*, 37 F.R.D. 6 (D.D.C. 1965). See related discussion surrounding note 23, *infra*, regarding the Government's duty to disclose.

[5] *See United States* v. *Armantrout*, 278 F. Supp. 517, 518 (S.D.N.Y. 1968); *United States* v. *Elife*, 43 F.R.D. 23, 24 (S.D.N.Y. 1967). The stipulation finally entered between the Government and the appellant regarding the prior contacts appellant had with agents of the FBI satisfied all the needs counsel for appellant expressed at the time. The final stipulation was hammered out in the presence of the judge, whose *in camera* scrutiny of the FBI reports precluded any relevant omissions from the stipulation. The counterstatement of the case, *supra*, shows the full disclosure made to appellant.

a premise for an attempted fishing expedition among FBI files. Inadequate need having been shown, and the reports being immaterial to the appellant's defense, the subpoena was properly quashed.

Had the trial judge committed error regarding (a) the adequacy of the showing of need made by appellant, (b) the nature of the material contained in the reports or (c) the interpretation of Rule 16 (a) (1), the subpoena was still not improperly quashed. This is because the rule does not provide for discovery of internal Government documents or memoranda,[6] and the protective order permitted by Rule 16(e) properly includes the order here issued.[7]

The privilege asserted by the Government in this case exists, as do most privileges, to preserve the inviolability of a communicative process in order to assure that essential communication continues. This is true of the attorney-client privilege and that of penitent and confessor. The investigation of criminal activity requires equally open communication between agents within a single agency, as well as among federal and local agents.

The recognition of the nature of this privilege in the courts is not new. In *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,*[8] the Attorney General refused to produce certain documents relating to the defendant's business on the ground they were "intradepartmental communi-

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[6] Though this omission is criticized in Rezneck, *The New Federal Rules of Criminal Procedure,* 54 GEO. L.J. 1276, 1280-1282 (1966), its existence is widely recognized by the courts. See *United States* v. *Elife,* 43 F.R.D. 23 (S.D.N.Y. 1967); *United States* v. *Marth,* 42 F.R.D. 432 (S.D.N.Y. 1967); *United States* v. *Birrell,* 276 F. Supp. 798, 826 (S.D.N.Y. 1967); *United States* v. *Acarino,* 270 F. Supp. 526 (E.D.N.Y. 1967); *United States* v *Louis Carreau, Inc.,* 42 F.R.D. 408, 416 (S.D.N.Y. 1967); *United States* v. *Westmoreland,* 41 F.R.D. 419, 427 (S.D. Ind. 1967); *United States* v. *Federman,* 41 F.R.D. 339, 341 (S.D.N.Y. 1967).

[7] A protective order may require deferment, restriction or complete denial of discovery. *United States* v. *Reid,* 43 F.R.D. 520 (N.D. Ill. 1967).

[8] 40 F.R.D. 318 (D.D.C. 1966).

cations containing opinions, recommendations and deliberations pertaining to decisions the Department was required to make as to litigation and other matters." The court held that "as documents integral to an appropriate exercise of the executive's decisional and policy-making functions, they are immune from the disclosure the claimants seek." This intra- and inter-departmental executive privilege is the only device available to assure the exchange of information and impressions among agents and agencies.[9]

Appellee submits that, if the information sought is determined to have been improperly denied appellant, no prejudice resulted. This may only be determined by a full reading of the information withheld, as well as a scrutiny of the record. It is clear from the record that the conviction of appellant turned on the jury's belief of his account of the delay in notifying FBI Agents of the French Poodle heist. If, in truth, there was no active participation by appellant in arranging the transportation of the furs to his sister's garage from the French Poodle, the long delay in notifying an agent is incomprehensible. No matter how many contacts with the FBI or what their nature, they could not establish a ground for such a delay.[10]

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[9] Appellant's assertion that 5 U.S.C. § 552 would "obviously require" disclosure of FBI records is entirely unsupported. While it is true that § 552 is relatively new and untested, appellant fails to point to a single subsection of this multi-faceted statute which supports such a bald assertion. Sections 552 (b) (5) and (7) clearly except the reports sought here from the requirements of § 552 (a) disclosure. No interpretation or explanation is offered of these exceptions by appellant, since none is available.

[10] Appellant's reliance on *Dennis* v. *United States*, 384 U.S. 855 (1966), is misplaced. Disclosure of grand jury testimony only avoids the element of trial surprise, as well as inconsistency of witnesses from grand jury to trial. No danger of disclosure of internal classified operations exists, since presumably no such information is disclosed to a grand jury. The same is true of *Allen* v. *United States*, 129 U.S. App. D.C. 61, 390 F.2d 476 (1968), relied upon by appellant. The files sought by appellant here were never provided to a grand jury, and only the *in camera*

II. The trial court correctly ruled inadmissible certain self-serving recorded statements of appellant.

Appellant asserts that a conversation, or portions thereof, which took place between himself and an informant named Skeens should have been admitted into evidence. The Haley housebreaking took place in May 1964, and the French Poodle housebreaking was in August 1964. The conversation between appellant and FBI agents in which he disclosed the names of the participants in the French Poodle burglary took place in September 1964. The proffered taped conversation between appellant and Skeens took place in February 1966, more than a year after the burglaries.

The ruling was correct that these statements, occurring long after the offenses charged, were inadmissible as exculpatory statements. A prior consistent statement has limited utility in a trial because:

> mere repetition does not imply veracity. Prior statements by the witness are admitted—and then only

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requirements of Rule 16 prompted submission to the trial judge. Thus no "waiver" of secrecy by the Government, such as that in *Dennis* and *Allen*, exists.

Reliance upon *Giles* v. *Maryland*, 386 U.S. 66 (1967) is likewise misplaced. In that case information which had been unavailable to the state court was presented to the Supreme Court . Mr. Justice Brennan, in an opinion joined by the Chief Justice and Mr. Justice Douglas, voted to remand for a determination by the state court of the effects of newly discovered evidence. This is in accord with the Court's practice of "noticing supervening matter in order to avoid deciding constitutional questions by allowing state courts to take action which might dispose of the case." *Id.* at 80. Mr. Justice White concurred on identical grounds, but failed to join the opinion of Mr. Justice Brennan because of disagreement with some of its dicta. Mr. Justice Fortas would have ordered a new trial due to the failure to disclose the suicide attempt following another alleged rape of the complaining witness in the case. Though he would have reversed on the issue decided below, Mr. Justice Fortas concurred in the judgment to remand for reconsideration of the new evidence *Id.* at 99.

Whatever appellant here thinks the *Giles* case stands for, it is inescapable that only a single proposition results from the 54 pages of opinion. That is that where new evidence arises before an appellate court, it should avoid constitutional questions by remanding for reconsideration in the light of the new evidence.

> for rehabilitative purposes—only in those few exceptional situations where, as experience has taught, they could be of clear help to the factfinder in determining whether the witness is truthful.[11]

The Government did not suggest that appellant had told anyone any version of the events contradicting the position taken at trial. Thus there was no suggestion by the Government that his story was a *recent* fabrication.[12] The proffered statements could not negate a fabrication, since they did not antedate a motive to fabricate.[13] Their lack of trustworthiness is clear, as is their total lack of probative value.[14]

Appellant apparently concedes the inadmissibility of the evidence, and then seeks to have this Court rule it admissible because of errors claimed in two other trials (Br. 28-29). Obviously, it is in the appeals of those other trials that the challenge to the evidence must be decided.

Appellant raises another issue in his second argument. It is treated in this portion of the brief for the convenience of the court. The doctrines of *Brady* v. *Maryland*,[15]

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[11] *Coltrane* v. *United States*, —— U.S. App. D.C. ——, ——, 418 F.2d 1131, 1140 (1969) (footnotes omitted). *See also Gregory* v. *United States*, 125 U.S. App. D.C. 140, 146, 369 F.2d 185, 191 (1966).

[12] *See United States* v. *Leggett*, 312 F.2d 566, 572 (4th Cir. 1962).

[13] *Affronti* v. *United States*, 145 F.2d 3, 7 (8th Cir. 1944). Indeed, the motive to fabricate was great at the time of the Xydas-Skeens conversation. Barnes was in custody, and it was known that he was disclosing a great deal about his burglary career. Fear that anybody else who was connected with Barnes might begin to inform would counsel each of those fearing implication to get his stories straight, and stick to them even among co-conspirators.

[14] Hasty denial to each other of any knowledge of the subject matter of the conversation Skeens and Xydas are having takes place so many times throughout the transcript that the whole conversation is clearly incredible. (See Conv. Tr. 3-4, 5-6, 8-9, 14, 20, 22, 23.) The Xydas statements are self-serving and so calculated as to be of no probative value on the question of veracity.

[15] 373 U.S. 83 (1963).

Levin v. *Katzenbach*,[16] and *Levin* v. *Clark*[17] seem to expand somewhat the duty of the Government to disclose exculpatory statements. *Brady* holds that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[18] *Levin* v. *Katzenbach* holds to be error the negligent failure to disclose evidence which, in the context of the case, might have led the jury to entertain a reasonable doubt about appellant's guilt.[19] *Levin* v. *Clark* fills in the meaning of *Levin* v. *Katzenbach* by applying the standard there set forth to determine whether the withheld evidence provided a ground for reversal of the conviction. This Court felt bound to reverse "even if the [withheld] statement's only significance were in the way a jury might have viewed it." The Court, even though it realized the highly speculative nature of the exploration of the impact of withholding evidence, nonetheless ruled that the possibility that the jury would have "attached significance" to the statement required reversal.[20] The Government's petition for rehearing *en banc* was denied, and separate explanations of votes upon denial were set forth.[21] These statements, along with those in *Ross* v. *Sirica*,[22] indicate the *Levin* cases did not so much settle the constitutional rules of discovery as engender conflict.

The position taken in Part I of this argument is that Rule 16, at least in the context of this case, reaches

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[16] 124 U.S. App. D.C. 158, 363 F.2d 287 (1966).

[17] 133 U.S. App. D.C. 6, 408 F.2d 1209 (1967).

[18] 373 U.S. at 87.

[19] 125 U.S. App. D.C. at 134, 363 F.2d at 291.

[20] 133 U.S. App. D.C. at 12, 408 F.2d at 1215.

[21] 133 U.S. App. D.C. at 18, 408 F.2d at 1221.

[22] 127 U.S. App. D.C. 10, 19-20, 380 F.2d 557, 566-67 (1967). And see the discussion of this case in *Sciortino* v. *Zampano*, 385 F.2d 132, 134 (2d Cir. 1967).

any item which should be constitutionally discoverable upon request.[23] The *Levin* cases deal with unrequested information and the prosecution's duty to disclose it. Appellant asserts that a statement made by Martha Painter is an exculpatory statement and under the *Levin* doctrines should have been revealed by the prosecution.[24] The answers to this assertion are (1) that this statement was revealed, prior to trial as appellant admits, and (2) that the acquittal on the Haley housebreaking precludes reversal on the French Poodle charge for an error which applied only to the former. Thus the *Levin* cases are inapplicable to this statement.

Appellant then points out a Barnes statement derived from his disclosed grand jury testimony, which appellant used at trial.[25] This is apparently meant by appellant to evidence the conclusion that the Government did not systematically withhold information useful to the defense. The fact that the Skeens statement mentioned by appellant[26] was also disclosed by the Government is presumably meant to corroborate counsel's assertion that there was a fair trial in this case (Tr. 842).

The statement of Marsha Skeens, taken from page 1809 of her grand jury testimony, is asserted to fall within the requirements of the *Levin* cases and to demand reversal standing alone. The Government has never disputed the contention that the burglars stopped at the Skeens house. (Tr. 248). The statement of Marsha Skeens says no more. Appellant was not hampered in his ability to prove the stop at the Skeens house, since

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[23] The debate goes unresolved in *Giles* v. *Maryland*, 386 U.S. 66 (1967), but runs through the opinions in that case. Mr. Justice Fortas would extend the rule to one like that of *Levin*, but none of the other Justices addressing the issue appears to concur. The parameters of the constitutional rule are discussed in a Panel Discussion, before the Judicial Conference of the Second Judicial Circuit, *Discovery in Criminal Cases*, 44 F.R.D. 481 (1967). See the comments at 44 F.R.D. 501-505.

[24] See Appellant's Brief at 31-33.

[25] *Id.* at 33.

[26] *Id.* at 34.

the Government stipulated the distances between the points in question on a map (Tr. Vol. 4, p. 508-510), and other proof was offered of appellant's theory of defense (Tr. Vol. 3, p. 317E). Mrs. Skeens was quite available to appellant but was not called as a witness. Her recorded conversations concerning the case were played for appellant in advance of trial (PT 75-76). No basis for a claim of prejudice is seen.

III. The single trial of appellant on two similar and connected offenses, not objected to until now, was correctly permitted by the trial court.

In his fourth argument appellant collects a series of events occurring during the prosecution of this case which he feels have been prejudicial. Most have not even occurred in the presence of the jury which convicted appellant. No claim is apparently made by appellant that the newspaper quotation of the prosecutor's argument before the United States Commissioner was so prejudicial as to deny him a fair trial. The severance of appellant's case from those of Klein and Wallace precludes assertion of prejudice from statements made by the prosecutor in those cases.

Appellant seems to make only a single assertion in his fourth argument. That is that the Government should have been so certain that appellant had nothing to do with the Haley housebreaking that it should not have prosecuted him for that offense. This assertion belies the strong evidence to the contrary. Nonetheless the conclusion of appellant seems to be that the trial of the two offenses together was improper. This assertion is said to be based upon the teachings of *Bruton* v. *United States*.[27]

Bruton teaches the danger of relying upon limiting instructions and holds that insistence that a jury is capable of performing intellectual gymnastics will not be tolerated. The jury is to be presumed capable of only what men actually do through their normal reasoning abilities.

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[27] 391 U.S. 123 (1968).

Thus, *Bruton* concludes, the jury may not be expected to disregard for one purpose what it believes for another. In the present case acquittal on the Haley charge meant the jury did not believe the evidence against appellant. Thus it is logical to presume that it was disregarded by the jury in considering the French Poodle offense.

Rule 14, FED. R. CRIM. P., permits joinder of offenses for trial. The best recent analysis of its proper application came in *Drew* v. *United States*,[28] where this Court said:

> The justification for a liberal rule on joinder of offenses appears to be the economy of a single trial. The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) he may become embarrassed or confounded in presenting separate defenses (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. Thus, in any given case the court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of economy and expedition in judicial administration.

The prejudice claimed by appellant is that the Haley housebreaking evidence influenced the conviction for the French Poodle offense. The jury was clearly able to distinguish the evidence, as seen by the acquittal on the Haley housebreaking accompanied by a guilty verdict for the French Poodle offense.[29] No claim is made by appel-

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[28] 118 U.S. App. D.C. 11, 14, 331 F.2d 85, 88 (1964).

[29] *See Barnes* v. *United States*, 127 U.S. App. D.C. 95, 96, 381 F.2d 263, 264 (1967); *Matthews* v. *United States*, 115 U.S. App. D.C. 339, 341, 319 F.2d 740, 742, *cert. denied*, 375 U.S. 943 (1963).

lant that the trial court erroneously admitted any evidence. The mere assertion that the prosecutor should never have gone to trial on the Haley housebreaking is used to parlay appellant's claim of prejudice to the constitutional level.

The Government does not read the evidence available at trial as does appellant. As for the Haley counts, some evidence of an exculpatory nature existed. Such a fact never has been thought to be a bar to prosecution. The Government's case had obvious merit and could have resulted in conviction. Appellant's claim of spurious prosecution is unfounded.

A request by counsel for appellant, not shown on the record, brought about the single trial on the Haley and Poodle offenses. The Government agreed to appellant's motion in the *Wallace* case for severance of appellant as well as withdrawal of the conspiracy count. Upon the request of appellant's counsel that the Haley and French Poodle offenses be tried together, the Government acquiesced. This tactical decision by appellant was clearly made to avoid the impact of evidence from the conspiracy counts. The Government agreed to the joint Haley-French Poodle trial to permit defense counsel fair latitude in his strategic decisions. The acquittal for the Haley offense displays the partial success of the strategy. However, the fact that this strategy was not completely successful may not now be made the basis for a claim of constitutional error.[30]

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[30] It is especially inappropriate to let stand the charge that this joint trial was a "device" used by the Government in a vicious plot to convict an innocent family man (Br. 2). If the joining of these offenses for trial was a "device" at all, it was appellant's device. This explains the failure of appellant's counsel to object to joinder, as he had done to obtain the severence from the other defendants, in an otherwise complete and painstaking defense.

The proposition that a reasonable strategic decision by defense counsel cannot be made a ground of error on appeal is laid down in numerous cases collected in *Bruce* v. *United States*, 126 U.S. App. D.C. 336, 340 n.5, 379 F.2d 113, 117 n.5 (1967).

Appellant's failure to object to joinder or to seek a severance, understandable in the light of this strategic decision, preclude him from now asserting the error.[31] The cases which have overturned convictions due to misjoinder of offenses have never included only two offenses with the close connections displayed in the present case.[32] Barnes, the burglar turned witness, was the thief in each case, and each case involved appellant's relationship with Barnes as a participant on the periphery of his heists. If the Government had severed each count charged against each of the dozens of defendants charged in connection with the Barnes disclosures, easily over 100 separate trials would have been necessary. The limited prosecutorial staff, the docket congestion in the District Court, and the defendants' right to speedy trials militate heavily against such a result.[33]

IV. The trial court correctly considered the relevant factors and information in sentencing appellant.

Appellant asserts that the trial judge erred in considering sworn testimony from related cases for the purpose of sentencing appellant after a verdict of guilty was returned. Appellant also seems to claim error due to alleged influence of *in camera* examintaion of FBI records on the sentence imposed, or, in the alternative, that an inference of fact drawn from the trial record was erroneous.

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[31] The discretion of the trial judge under Rule 14, FED. R. CRIM. P., was never invoked, and only the clear abuse of that discretion could justify reversal even if motion had been made. *Brown* v. *United States*, 126 U.S. App. D.C. 134, 375 F.2d 310 (1966), *cert. denied*, 388 U.S. 915 (1967).

[32] As *Drew*, *supra* note 28, points out, there is no requirement of severance where the evidence of each crime is "simple and distinct," as here. 118 U.S. App. D.C. at 17, 331 F.2d at 91.

[33] See Orfield, *Relief From Prejudicial Joinder in Federal Criminal Cases*, 36 NOTRE DAME LAWYER 276 and 495, 499 (1961); *Monroe* v. *United States*, 98 U.S. App. D.C. 228, 234 F.2d 49, *cert. denied*, 352 U.S. 873 (1956); Note, 68 HARV. L. REV. 1046 (1955); Note, 74 YALE L. J. 553 (1965).

Appellant's assertions are contrary to the elementary rules of sentencing and inconsistent with the record. A judge is not bound by the usual rules of evidence with regard to the information he may consider in determining sentence.[34] He may consider responsible unsworn or "out of court" information with regard to the circumstances of the crime and the life and characteristics of the convicted person.[35]

A showing that the judge relied on information that was clearly untrue would justify reversal.[36] The position of the judge that appellant was under suspicion at the time he spoke to the FBI agent was an inference properly drawn from the testimony in the trial. The record discloses that all of appellant's statements in the FBI files relevant to the French Poodle cases were made available to appellant (PT 81). Thus the judge could not have learned anything additional about FBI suspicions from them. Even if he had, this would be a proper source of information, and appellant has not proven the judge's assertion to be untrue.

The association of appellant with the Barnes conspirators was well established by sworn testimony in other proceedings. This is a proper subject for consideration in sentencing, since it bears on the likelihood of rehabilitation.[37] Appellant might properly resist admission of

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[34] *Williams* v. *New York*, 337 U.S. 241, 247 (1949); *United States* v. *Durham*, 181 F. Supp. 503 (D.D.C.), *cert. denied*, 364 U.S. 854 (1960); Note, *Procedural Due Process of Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968).

[35] *Williams* v. *Oklahoma*, 358 U.S. 576, 584 (1959). Interviews with agents of the FBI in chambers were held proper in *Stephan* v. *United States*, 133 F.2d 87 (6th Cir. 1943).

[36] *Townsend* v. *Burke*, 334 U.S. 736 (1948).

[37] "The punishment should fit the offender and not merely the crime." *Williams* v. *New York*, *supra* note 34, 337 U.S. at 247; *Leach* v. *United States*, 118 U.S. App. D.C. 197, 202, 334 F.2d 945, 950 (1964). See also AMERICAN BAR ASS'N, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES, Tent. Draft 1967, § 2.2.

such evidence at a trial on the merits of the French Poodle case. It was not introduced at trial. By raising its consideration at sentencing, appellant creates a straw man.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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